Supreme Court, U.S.
FILED

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No. : _____

In the

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, et al.,

Respondents,

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New York

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

Petitioner Adrienne Marsh Lefkowitz seeks to challenge the constitutionality of a New York Statute, Surrogate's Court Procedure Act ("SCPA") §506 and a hearing under which a private attorney was appointed (as a referee to hear and report) *sua sponte* by the probate judge overseeing petitioner's father's estate. The appointment of the referee to hear and report was made without consent, and indeed he served over petitioner's objection. Yet the legislative history of SCPA §506 indicates that consent to a reference is necessary. (49a) The referee conducted a (1994) hearing regarding petitioner's accounting as former preliminary executrix of her father's estate and three consolidated attorney fee proceedings (under SCPA §2110), which culminated in charges (with interest) of almost two million dollars against petitioner as well as significant damage to her professional reputation.

Petitioner argues that SCPA §506 and its application herein are unconstitutional and unconstitutional as applied as repugnant to the U.S. Constitution (V & XIV amendments) – in particular in violation of petitioner's due process and equal protection rights, and that the 1994 hearing by a referee deprived her of almost two million dollars and her reputation without due process or equal protection of law.

The Court of Appeals of the State of New York *sua sponte* dismissed petitioner's appeal as of right on the jurisdictional ground "that no substantial constitutional question is directly involved." *In re Marsh*, N.Y.2d (Dec. 21, 2000). (at 1a)[1] Previously, the Appellate Division did not

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1. References to the Appendix to this petition are denoted as "___a." References to the Appendix submitted to the New York Appellate Courts are denoted "A- ." That appendix includes the relevant hearing transcripts and exhibits.

"... find any defect in the referee's services." *In re Estate of Marsh*, 265 A.D.2d 253 (1st Dept. 1999). (See 4a.)

This motion raises numerous substantial federal questions that warrant a Writ of Certiorari:

1. Is the constitutionality of New York Surrogate's Court Procedure Act ("SCPA") §506 a substantial constitutional question that is directly involved in the appeal of orders and a decree based on a hearing conducted by a private attorney appointed as a referee under SCPA §506 without consent?

2. Is SCPA §506 unconstitutional?

3. Is SCPA §506 unconstitutional as applied?

4. Was petitioner denied her constitutional rights to due process of law in surcharging her almost two million dollars based upon a hearing conducted by a referee to hear and report appointed under SCPA §506 *sua sponte* by the probate court without consent and where the determination was made by the judge who had not had an opportunity to observe and weigh the credibility of the witnesses?

5. Where the referee sought and received payment from a respondent before issuing his report, engaged in at least 11 *ex parte* conferences with that respondent's counsel, never swore an oath of office and had an undisclosed out-of-court relationship with a party, and whose appointment did not comply with New York CPLR 4315, 4312(3), 4321(1), was petitioner denied a fair trial and her due process rights?

6. Was it a violation of the equal protection clause for the state of New York to have allowed the use of the referee without consent, and in fact over petitioner's objection?

7. Where the referee made material representations to petitioner, did he violate her due process rights? *Inter alia*: the referee stated on June 15, 1994 that petitioner had met her burden of proof on a key issue, cutting off her presentation of evidence, but then ruled against her, recommending a surcharge of over $1.6 million including interest.

8. Is it unconstitutional to impose referee fees, now approximately $300,000, without consent of the parties?

9. In permitting the court to proceed without subject matter jurisdiction over some issues were petitioner's due process rights violated?

10. Was it a violation of petitioner's due process (and First Amendment) rights to prohibit her court reporter from transcribing an unofficial transcript at petitioner's expense, after the mechanical transcribers had misidentified speakers and made otherwise seriously defective transcripts?

11. Was it a violation of petitioner's due process rights to order her to pay $250,000 (plus interest) to other beneficiaries' attorneys without a hearing on the issue or notice?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

Adrienne Marsh Lefkowitz — Petitioner
323 S. Doheny Drive Apt. 207
Los Angeles, CA 90048
the accounting party, nominated fiduciary,
only outright beneficiary
pro se

The Bank of New York as Executor of the — Respondent
Estate of Nicholas Marsh
123 Main Street
White Plains, NY 10602
the objectant to the Lefkowitz accounting
represented by:
McCarthy, Fingar, Donovan, Drazen & Smith
11 Martine Avenue
White Plains, NY 10606
and Executor of the Estate of Irene Marsh — Respondent
formerly trust beneficiary

Stuart Salles, Esq. — Respondent
267 Broadway
New York, NY 10007
former temporary administrator of the estate
pro se

Loretta Marsh Fine — Respondent
150 East 69th St.
New York, NY 10021
trust beneficiary
represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

Claudia Marsh Appelbaum — Respondent
The Bluff
West Summit Road
Tuxedo Park, NY 10987
trust beneficiary
represented by:
Greene & Zinner
202 Mamaroneck Ave.
White Plains, NY 10601

Greene & Zinner, P.C. — Respondent
202 Mamaroneck Ave.
White Plains, NY 10601
fee petitioner *pro se* (and counsel to
Claudia Marsh Appelbaum)

Schulte Roth& Zabel — Respondent
919 Third Avenue
New York, NY 10022
fee petitioner
represented by:
D'Amato & Lynch
70 Pine Street
New York, NY 10270

Shea & Gould
fee petitioner
(In bankruptcy by time of 1994 hearing,
did not appear at 1994 hearing or submit briefs.)

Julie Lefkowitz — Respondent
323 S. Doheny Drive #207
Los Angeles, CA 90048
trust beneficiary who did not appear

Lauren Fine
1151 N. Atlantic Blvd.
Ft. Lauderdale, FL 33304
trust beneficiary who did not appear

Respondent

Solicitor General, Dept. of Law
The Capital
Albany, NY 12224

CORPORATE DISCLOSURE STATEMENT
RE THE BANK OF NEW YORK

The Bank of New York is a subsidiary of The Bank of New York Co., Inc., a publicly traded company trading as BK, with headquarters at One Wall Street, New York, N.Y. 10286.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES TO THE PROCEEDING IN THE COURT BELOW	iv
CORPORATE DISCLOSURE STATEMENT RE THE BANK OF NEW YORK	vi
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	ix
CITATIONS TO REPORTS OF THE CASE/OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS PETITION	4
STATEMENT OF THE CASE	4
ARGUMENT WHY WRIT SHOULD BE ALLOWED	11
I. CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE REFEREE'S SERVING, AND IN THE HEARING	16
II. AWARD OF $250,000 FROM PETITIONER'S SHARE OF THE ESTATE FOR OTHER PARTIES' ATTORNEY FEES, WITHOUT NOTICE OR A HEARING	22
CONCLUSION	26

IN APPENDIX

DECISIONS, ORDERS, DECREES BELOW

December 21, 2000 order of the New York Court of Appeals 1a
October 26, 1999 order of the Supreme Court, Appellate Division, First Department 3a
February 8, 2000 order of the Supreme Court, Appellate Division, First Department 6a
July 15, 1999 order of the Supreme Court, Appellate Division, First Department 8a
April 23, 1998 Surrogate's Decree on Preliminary Executor's Accounting 10a
1998 Decision of Surrogate 26a
1997 Decision of Surrogate 28a
1994 Decision of Surrogate 39a
May 16, 1997 Decision of Surrogate 40a
June 13, 2000 order of the New York Court of Appeals 42a

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS PETITION

Constitution of the United States Amendments I, V and XIV, §1 44a
NY CLS SCPA §506 46a

WHERE ISSUES WERE FIRST RAISED AND PRESERVED 52a

LIST OF DOCUMENTS SUBMITTED TO NEW YORK COURT OF APPEALS 58a

TABLE OF AUTHORITIES

Pages

CASES:

Ament v. Schubert Piano Co., 172 A.D. 423, 158 N.Y.S. 532 (1st Dept. 1916) 17

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) 20

Chapman v. Goodnow's Adm'r, 123 U.S. 540, (1887) .. . 4

Estate of Bellinger, 55 A.D.2d 448 (4th Dept. 1977) 24

Estate of Campbell, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3d Dept. 1988) 22

Estate of Heilbronner, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr.Ct. N.Y.Co. 1963) 26

Hebard v. City of New York, 137 A.D. 752, 122 N.Y.S. 628 (1st Dept. 1910) 17

Horn v. Bennett, 253 A.D. 630, 3 N.Y.S.2d 525 (2d Dept. 1938), *app. denied*, 278 N.Y. 736, 16 N.E.2d 804 (1938) 21

In re Baxter, 196 A.D.2d 186, 609 N.Y.S.2d 992 (4th Dept. 1994), *mot. for rearg. or lv. to app. denied*, 1994 N.Y. App. Div. LEXIS 7935 (July 1, 1994), *lv. to app. denied*, 84 N.Y.2d 808 (1994) 24, 25

In re Estate of Marsh, 265 A.D.2d 253,
697 N.Y.S.2d 25, 1999 N.Y. Slip Op. 08841
(N.Y.A.D. 1 Dept., Oct. 26, 1999)
Decree affirmed ..... ii, 1

In re Estate of Marsh, 207 A.D.2d 749, 616 N.Y.S.2d
962 (N.Y.A.D. 1 Dept. Sep. 29, 1994) 1

In re Estate of Marsh, 202 A.D.2d 367, 610
N.Y.S.2d 6 (N.Y.A.D. 1 Dept. March 31,1994) 1

In re Estate of Marsh, 173 A.D.2d 336, 575
N.Y.S.2d 284 (N.Y.A.D. 1 Dept., May 21, 1991)
App. Dismissed. 78 N.Y.2d 990 and *App. Denied*
79 N.Y.2d 751 1

In re Marsh --- N.Y.2d ---, --- N.E.2d ---- (N.Y.
Dec. 21, 2000) (TABLE, NO. 1401 SSD 82)
(TEXT NOT AVAILABLE ON WESTLAW).
Appeal dismissed ..... i, 1

In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759,712
N.Y.S.2d 447 (N.Y. June 13, 2000) (TABLE, NO. 474).
Leave to appeal denied 1

In re Estate of Scarsella, 195 A.D.2d 513, 600
N.Y.S.2d 256 (2d Dept. 1993) 24

Logan v. Zimmerman Brush Co., 455 U.S.422,
102 S.Ct. 1148 (1982) 16, 20

Matter of Birnbaum v. Birnbaum, 157. A.D.2d 177
(4th Dept. 1990) 24

Matter of Browning, 258 A.D. 621, 17 N.Y.S.2d 557 (1st Dept. 1940) 21

Matter of Dillon, 28 N.Y.2d 597, 268 N.E.2d 646, 319 N.Y.S.2d 850 (1971) 25

Matter of Duke, 87 N.Y.2d 465, 640 NYS 2d 446, 663 NE2d 602 (1996). 16

Matter of Graves, 197 Misc. 638 (Surr. Monroe Co. 1950) 24

Matter of Hidden, 243 N.Y.499, 154 N.E. 538 (1926) ... 25

Matter of Liebowitz, 34 A.D.2d 750, 310 N.Y.S.2d 529 (1st Dept. 1970) 21

Matter of Lounsberry, 226 A.D. 291, 234 N.Y.S. 680 (4th Dept. 1929) 24, 25

Matter of Marsh, 78 N.Y.2d 990, 580 N.E.2d 758, 575 N.Y.S.2d 272 (N.Y. Sep. 12, 1991) 1

Matter of Marsh, 79 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651 (N.Y. Dec. 18, 1991) 1

Matter of Robinson, 187 A.D. 799, 176 N.Y.S. 273 (1st Dept. 1910) 17, 18

Matter of Smith, 167 Misc. 95 (N.Y.Sur. 1938) 24

Matter of Urbach, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3d Dept. 1999) 23, 25

Matter of Wilhelm, 88 A.D.2d 6, 452 N.Y.S.2d 957 (4th Dept. 1982) 25

Matter of Wiltshire, 4 A.D.2d 981, 167 N.Y.S.2d 852 (3d Dept. 1957) 24

Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971) 13

M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed. 2d 473 (1996) 13

Moore v. County of Clinton, 219 A.D.2d 131, 640 N.Y.S.2d 927 (3d Dept. 1996), *lv. denied*, 89 N.Y.2d 851 (1996) 21

Mullane v. Central Hanover Bank & Trust Co.,339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 22

Nat'l Bank of North America v. New Paltz Growers, Inc., 89 A.D. 2d 647, 453 N.Y.S.2d 124 (3rd Dept. 1982) 17

Perkins v. Perkins, 226 A.D.2d 610, 641 N.Y.S.2d 396 (2d Dept. 1996) 21

Ploski v. Riverwoods Owners Corp., 255 A.D.2d 24 (2d Dept. 1999) 13

Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982) 16

Street v. New York, 394 U.S.576 (1969) 3

United States v. Kras, 409 U.S.434, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973) 15

Voron v. Chait, 101 Misc. 366, 167 N.Y.S. 657 (Sup.Ct. N.Y.Co. 1917), *aff'd*, 183 A.D. 925, 169 N.Y.S. 1117 (1st Dept. 1918) 17

Will of Marsh, 179 A.D.2d 578, 578 N.Y.S.2d 911 (N.Y.A.D. 1 Dept. Jan. 30, 1992) 1

Will of Marsh, 179 A.D.2d 581, 579 N.Y.S.2d 64 (N.Y.A.D. 1 Dept. Jan. 30, 1992) 1

STATUTES & RULES:

CPLR 3104 13

CPLR 4312(3) ii

CPLR 4315 ii

CPLR 4321(1) ii

CPLR 4518 15

CPLR 5015 8

Judiciary Law §290a 19

SCPA §506 or
NY CLS SCPA §506 i, ii, vii, viii, 2, 3, 4, 11, 12, 13, 16, 18

SCPA §711 ..... 7, 11

SCPA §719 11

SCPA §2110 ..... i, 11

Sup.Ct.R. 10(c) 11

28 U.S.C.A. §1257(a) 3

28 U.S.C.A. §2403(b) 3

U.S. Constitution 2, 5, 12

U.S. Constitution (V Amdmt) ..... i, viii, 4, 16

U.S. Constitution (XIV Amdmt) ..... i, viii, 4, 16, 20

U.S. Constitution (I Amdmt) ..... iii, viii, 4

OTHER AUTHORITIES:

Siegel, D., *New York Practice*, 2d Ed. §379, p. 573 17

Siegel, D., *New York Practice*, 3d Ed., §379, p. 614 17

CITATIONS TO REPORTS OF THE CASE/OPINIONS BELOW

The three opinions below are reproduced in the appendix annexed hereto.

In re Marsh --- N.Y.2d ---, --- N.E.2d ---- (N.Y. Dec. 21, 2000) (TABLE, NO. 1401 SSD 82) (TEXT NOT AVAILABLE ON WESTLAW). Appeal dismissed. See 1a.

In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759, 712 N.Y.S.2d 447 (N.Y. June 13, 2000) (TABLE, NO. 474). Leave to appeal denied. See 42a.

In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25, 1999 N.Y. Slip Op. 08841 (N.Y.A.D. 1 Dept., Oct. 26, 1999) (NO. 2148). Decree affirmed. See 3a.

Other Related References

In re Estate of Marsh, 173 A.D.2d 336, 575 N.Y.S.2d 284 (N.Y.A.D. 1 Dept., May 21, 1991) (NO. 43171, 43172)
Appeal Dismissed by
Matter of Marsh, 78 N.Y.2d 990, 580 N.E.2d 758, 575 N.Y.S.2d 272 (N.Y. Sep. 12, 1991) (NO. 811)
AND Appeal Denied by
Matter of Marsh, 79 N.Y.2d 751, 587 N.E.2d 289, 579 N.Y.S.2d 651 (N.Y. Dec. 18, 1991) (TABLE NO. 1201)

Will of Marsh, 179 A.D.2d 578, 578 N.Y.S.2d 911 (N.Y.A.D. 1 Dept. Jan. 30, 1992) (NO. 44713)

Will of Marsh, 179 A.D.2d 581, 579 N.Y.S.2d 64 (N.Y.A.D. 1 Dept. Jan. 30, 1992) (NO. 44714N)

In re Estate of Marsh, 202 A.D.2d 367, 610 N.Y.S.2d 6 (N.Y.A.D. 1 Dept. March 31,1994) (NO. 51608)

In re Estate of Marsh, 207 A.D.2d 749, 616 N.Y.S.2d 962 (N.Y.A.D. 1 Dept. Sep. 29, 1994) (NO. 52623)

STATEMENT OF JURISDICTION

Petitioner Adrienne Marsh Lefkowitz respectfully prays

that a writ of certiorari be issued to review the orders of the appellate courts of the State of New York, the constitutionality of SCPA §506 and its application, and whether the proceedings had herein met even minimal constitutional standards.

Because a trial by a private attorney (clandestinely prepaid by a party), appointed without consent, in lieu of a trial by a duly constituted court or jury, is so fundamentally abhorrent to the requisites of the U.S. Constitution, this is a matter of utmost federal importance.

It is a cornerstone of our system of jurisprudence and the rights of the citizens of this country that all citizens be afforded due process and equal protection regardless of wealth. Thus, "the wealthy"[2] have no lesser rights to a fair trial and "the wealthy" should not have to submit to a vastly more expensive yet defective legal process than do ordinary citizens. It is a violation of due process and equal protection of the laws to subject "the wealthy" to hearings by privately paid referees without consent and at great cost. In our system of jurisprudence access to a judge or jury is not to be denied on the basis of wealth or lack of wealth. There is no countervailing state interest to justify so egregious an incursion on a litigant's constitutional rights and in contravention of the purpose of SCPA §506 (See 49a).

Because the Internal Revenue Service is denied vast amounts of tax revenues when the cumulative effect of these estate administrative expenses[3] are considered, this petition

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2. Moreover, heirs to wealthy estates are not necessarily wealthy - particularly if distributions are withheld from them, as has occurred repeatedly herein. Petitioner proceeded *pro se* during the hearing and post-hearing submissions because her distribution from the estate was seized by her adversary, the executor.

3.Even were the estate tax to be entirely eliminated, which is unlikely, estate income taxes will continue and individual states may retain estate taxes.

goes well beyond petitioner's individual interests and the case at bar.

Jurisdiction is sought under 28 U.S.C.A. §1257(a).

28 U.S.C.A. §2403(b) may apply and the New York State Solicitor General is being served with this document.

This petition relates to a December 21, 2000 decision and order of the New York Court of Appeals (at 1a) which, *inter alia, sua sponte* dismissed petitioner's appeal as of right, *inter alia*, challenging the constitutionality of SCPA §506 on the ground that no substantial constitutional question is directly involved. This order from the state's highest court was a final order.

"The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the State Courts." *Street v. New York*, 394 U.S.576, 583 (1969).

The appeal to the Court of Appeals was taken from the Supreme Court of the State of New York, Appellate Division, First Department. The dates of service and filing of the Notice of Appeal to the New York Court of Appeals were October 6, 2000 and October 10, 2000, respectively.

On April 11, 2000 petitioner had moved for permission to appeal to the Court of Appeals. On September 5, 2000, notice of entry was served on petitioner by a Respondent by regular mail, of a June 13, 2000 order of the Court of Appeals denying that motion (at 42a).

Notice of entry of the lower court orders were:

Notice of entry was on November 4, 1999 of an October 26,1999 order (at 3a) of the Appellate Division which was mailed by a Respondent.

On November 24, 1999 petitioner served by regular mail a motion to the Appellate Division for reargument. On December 7, 1999 she served by regular mail a motion to the Appellate Division for leave to appeal to the Court of Appeals.

Notice of entry was sent by overnight delivery upon petitioner on March 16, 2000 of the Appellate Division's February 8, 2000 order denying the petitioner's motions(at 6a).

The matter commenced in New York County Surrogate's Court, which culminated in an April 23, 1998 decree (entered on April 27, 1998) (at 10a) regarding petitioner's accounting (filed in 1990) and three consolidated attorney fee proceedings. Notice of entry was served on April 29, 1998 by a respondent. The notice of appeal was served on May 26, 1998 by regular mail.

The appendix at pp. 52a *et seq.* describes how petitioner raised below and preserved the questions presented in this petition.

> "If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right ... as if it had been specifically referred to and the right directly refused."

Chapman v. Goodnow's Adm'r, 123 U.S. 540, 548 (1887). Thus irrespective of whether the New York appellate courts expressly ruled on petitioner's federal claims, the judgment below necessarily reflects the federal questions.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS PETITION

The Appendix contains the text of:

U.S. CONSTITUTION at 44a
Amendments I, V, and XIV, §1
SCPA 506 at 46a

STATEMENT OF THE CASE

This case originated in the probate court of New York County where patronage appointments have frequently been

made. However, prior practice did not include appointment of private attorneys to act as referees without consent of the parties to conduct hearings. Petitioner was deprived of almost $2 million, a property right, on the basis of such a hearing. In addition, as a 30% beneficiary of the estate, she has been compelled to absorb a portion of the fees of approximately $300,000 (to date) to the referee. Petitioner has consistently and vigorously resisted the imposition of the patronage appointees on her father's estate over the past 12 years.[4]

Appellant was the nominated co-executrix of her parents' reciprocal wills, dated May 26, 1983. (A-3594) Nicholas Marsh, her father, died on March 15, 1988. The primary asset of Mr. Marsh's American Estate was a fifty per cent (50%) interest in a family close corporation, JMI,[5] which was founded in 1913 by Mr. Marsh's parents. The other fifty per cent (50%) of JMI was owned by the decedent's spouse, Irene Marsh. Until her resignation on January 31, 1990, petitioner served as the chief operating officer and as a director of JMI. Mrs. Marsh, the sole beneficiary of this estate at the time, was also a director of JMI. With Mr. Marsh's demise, Mrs. Marsh and petitioner were the two surviving directors. Before his death, Mr. Marsh set up two other corporations in 1987, FMI and NVM, which were wholly owned by him. Petitioner was the chief operating officer of FMI and NVM as well.

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4. Both the temporary administrator, Stuart Salles, and the referee were labor lawyers. Mr. Salles was a District Council 37 attorney. Their total fees to date are almost $500,000. The Referee had no expertise in estate law.

5."JMI" refers to Joseph Markovits, Inc., "FMI" refers to Floral Masquerade, Inc., and "NVM" refers to NVM Capital Corp. "BNY" refers to The Bank of New York. "TR" refers to the condensed version of the hearing transcripts. Petitioner's exhibits are referred to as AML Exhibit # ____. BNY exhibits are referred to as BNY Exhibit # ____. "MFDDS" refers to estate counsel McCarthy, Fingar, Donovan, Drazen & Smith.

Petitioner's corporate positions pre-existed her fiduciary role.

Preliminary Letters Testamentary in the Estate of Nicholas Marsh were issued to the petitioner on or about April 25, 1988. On or about December 20, 1988, McCarthy, Fingar, Donovan, Drazen & Smith ("MFDDS"), acting then as attorneys for Mrs. Marsh, served a motion seeking to remove petitioner as preliminary executrix and requesting appointment as preliminary executor of an independent individual or bank.[6]

In June of 1988, the new companies, FMI and NVM - which were wholly owned by the Estate - had received funds of $1.5 million from the Estate; FMI was funded with $500,000 and NVM with $1 million. This funding in 1988 was effected after the petitioner had sought advice from her estate attorneys Schulte, Roth & Zabel who opined by letters that such transfers were proper. (AML Exhibits #59 & 60)(A-4046, 4047)

In the spring of 1989, JMI, along with some of its affiliates, was appraised by Touche-Ross at a value of over $13 million (AML Exhibit #39) (A-3965 to 4020). In June of 1989, Stuart Salles, the Temporary Administrator who was charged with obtaining the appraisal and finding a buyer for the companies (and safeguarding the Estate assets), did not entertain an offer for JMI of $9 million because he considered it as too low. (TR: 12/28 pp. 34-35, 41-42) (A-2485, 2486, 2487) (A-4088 to 4090).

In 1989, JMI was experiencing liquidity problems while being offered for sale. In order to keep the business going in 1989 during this period of impending sale, loans of $1.25 million were made by FMI and NVM to JMI. (BNY #51, 64, 66

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6. By custom of BNY, who appoints as estate counsel the attorney who drafts a will by which BNY becomes appointed fiduciary, MFDDS (who drafted the 1983 wills) stood to become estate counsel to BNY were BNY to be appointed fiduciary in the Estate. (BNY was nominated as an alternate fiduciary in the will although decedent had had no dealings with BNY.)

and AML #99, 188, 189, at A-3714, 3722-3740, 3741-42, 4151, 4398, 4399). With regard to these 1989 loans to JMI from the Estate companies, the petitioner sought and obtained the approval of the successor estate counsel as well as the corporate counsel. (TR: 6/10 p. 91, 97, 212, 215 at A-946, 947, 976, 977). Mrs. Lefkowitz also informed her co-fiduciary Mr. Salles (AML #103 at A-4152) and her mother of the need to transfer funds into JMI and sought their approval with respect to this matter. Indeed, as early as May 1989 and certainly at a June 20, 1989 status conference, the Court, Mr. Salles, and the beneficiaries, including the decedent's widow Mrs. Marsh, were made aware that loans to JMI were needed. Judicial notice is sought of A-4492 to 4506, 4512-13.

On December 21, 1990, Mrs. Lefkowitz filed her verified petition for an accounting as former preliminary executrix.[7] (A-3509 et seq.). In 1991, BNY filed its

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7. At a status conference held by Surrogate Lambert on January 31, 1990, the petitioner had resigned as officer and director of all of the domestic corporations in which the decedent had an interest as a shareholder. Petitioner had first sought to resign in May 1989. (AML Exhibit #136 at A-4223). At the urging of the other parties she continued in office (BNY Exhibit #68 at A-3744).

On March 19, 1990, another status conference was scheduled before Surrogate Lambert. (AML Exhibits #197 and 199 not in evidence). At this conference, the Surrogate summarily suspended petitioner as the preliminary executrix although there was no SCPA 711 petition pending and Mr. Salles was already serving as co-fiduciary. The Surrogate again expanded Mr. Salles' powers and set a removal hearing for one week later and dispensed with discovery or a petition, citing the Estate's alleged urgent need for funds.

A removal hearing was commenced on March 26, 1990. The Surrogate's Court entered a written Order revoking appellant's preliminary letters. Petitioner appealed unsuccessfully to the Appellate Division, First Department (173 A.D.2d 336). Approximately four months after appellant's removal, on August 22, 1990, Mr. Salles resigned and preliminary letters testamentary were issued to BNY.

On December 18, 1990 BNY and MFDDS negotiated and arranged

objections. In July 1993, BNY filed its amended objections. (A-3610 et seq.). A lengthy accounting hearing took place intermittently from May 17, 1994 through January 3, 1995[8] before a Referee to hear and report, Professor David Rudenstine, appointed *sua sponte* by Surrogate Preminger. Mrs. Lefkowitz had objected to the reference. (See, e.g., A-3424 et seq. and TR: 5/17 p. 50 at A-573).

Written submissions by the parties were filed by May 4, 1995. Almost seven months later, on December 1, 1995,

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BNY's clandestine sale of JMI and its affiliates to a third-party interest (including inside management and Irving Posner, who had been witnesses against Mrs. Lefkowitz) for $2,100,000, a price substantially higher than the $1.25 million in loans made to JMI (*see* AML Exhibit #42 at A-4021 et seq. and A-4606 to 4624), but well below the value of the companies which had over $8 million in hard assets at the time. (See, e.g. AML Exhibit #133 at A-4209 et seq.) The sale was made without the approval of then Surrogate Lambert who had convened a settlement conference on December 18, 1990, one purpose of which was to reinstate petitioner as the fiduciary. (AML Exhibit #128 at A-4191). There is no doubt that any outstanding balances on JMI's loans from NVM and FMI were repayable.

On or about June 3, 1991, the petitioner cross-moved pursuant to CPLR 5015, on grounds of newly-discovered evidence and fraud, for an order, *inter alia*, vacating the March 20, 1990 and April 19, 1990 Orders of the Surrogate's Court suspending and removing her, respectively. On December 4, 1992, the Surrogate's Court, by Hon. Eve Preminger, issued an Order denying Mrs. Lefkowitz's cross-motion. This order was appealed to the Appellate Division, First Department. On March 31, 1994, the Appellate Division issued a Decision and Order affirming the Surrogate's Order. (202 A.D.2d 367)

It is noteworthy that one of the grounds cited by the First Department in affirming her removal was Mrs. Lefkowitz's refusal to agree to seek additional loans to JMI in March, 1990, a time when JMI was (according to BNY) in worse condition than in 1989, when appellant made the loans for which petitioner was surcharged.

8. Three attorney fee proceedings had been consolidated with this accounting. The relevant hearings were held on May 11, 1994 through May 13, 1994.

Referee Rudenstine issued his belated report. (A-41 et seq.). *Inter alia*, his Report found: that petitioner should be surcharged $1,214,000 (plus interest) for loans she made to JMI in 1989 from NVM and FMI as a pre-existing president (Objections #27 and #28). He made this recommendation despite the fact that: a) tax returns filed by BNY and other "admissions" showed the loans were repaid at least in part; b) petitioner proved the loans were or could have been repaid, including evidence of over one million dollars in cash available at the debtor company; c) the Referee (and later the Surrogate) ignored the stipulations of the parties; d) the loans could have been fully repaid from the proceeds of a JMI sale in 1990 if they had not already been repaid; e) BNY never established a loss; indeed BNY never even established the loans had not been repaid; f) JMI's appraised value was over $13,300,00 in the relevant period (AML Exhibit #39 at A-3965 et seq.); g) Stuart Salles considered offers to purchase JMI of $9,000,000 as too low in June 1989; h) the $1.25 million loans preserved JMI for sale at over $2.1 million (of which this estate received 81.11%) and avoided a crash liquidation; i) Objectant BNY failed to produce the 1990 corporate records, including bank accounts, for NVM Capital. (BNY had control over the companies in 1990.) Yet the Referee surcharged petitioner for the $1 million loan NVM Capital had made in 1989 to JMI, as well as the FMI funds.

The Report was further tainted by other egregious errors of the Referee. The Referee acknowledged the unreliability of BNY Exhibit #39, the heart of BNY's case, and he claimed he did not rely on it. (p. 100 at A-142) (See footnote 12, *infra*.) The Referee also acknowledged that the providence of petitioner's actions should be judged by conditions at the time she acted. (p. 87 at A-129) However, the Referee then relied on BNY experts, particularly Mr.

Mallarkey (e.g. A-149 to 150), who relied not only on BNY Exhibit #39 but also on AML Exhibit #133, the 1990-1991 JMI financial statements, reflecting JMI's condition long after the mid-1989 loans. (TR: 12/9 p. 23 at A-2060)

The Surrogate denied petitioner's motion to vacate the Referee's appointment and for her own recusal (A-3155 to 3166) despite, *inter alia*, the following facts:

1) the Referee had received over $100,000 from BNY five months before issuing his Report (A-3229); (A-2954-55);

2) the Referee had at least 11 *ex-parte* phone conferences with BNY's counsel (A-3183 to 3196);

3) the Referee had an undisclosed out-of-court professional relationship with Stephen Schulte of Schulte Roth & Zabel (A-3239-42), a party and adversary of petitioner; and

4) the Referee apparently never swore an oath.

In July 1997 the Surrogate confirmed the Referee's Report on the surcharges other than reducing the Hong Kong tax penalty surcharge by 50% (approximately $13,000), without any further hearing. (A-29)

Thereafter motions to reconsider were made. In February 1998 the Surrogate denied petitioner's motion to reconsider but awarded $250,000 to the law firms (for other beneficiaries) to be paid from petitioner's interest in the estate (A-40) although the relevant petitions (A-2632, 2717) and hearings had addressed payment from the estate. (A-188-542).

A decree was signed in April 1998. (at 10a) The New York Appellate Division found no fault with the Referee's service. (at 3a) The New York Court of Appeals would not review the case on the merits. (at 1a)

The issues presented by this petition were expressly raised in the courts below. See 52a *et seq*.

ARGUMENT WHY WRIT SHOULD BE ALLOWED

The constitutionality of SCPA §506 and its application is a matter of public importance that reaches beyond the personal interest of petitioner. The decisions of the New York Appellate Courts "decided an important question of federal law that has not been, but should be, settled by this Court ..." Sup. Ct. R. 10(c). The constitutionality of any state statute is of importance. However, billions of dollars pass through the probate courts of New York. New York's statutory scheme for probate courts has deferred to the discretion of the Surrogate judges to an enormous extent – e.g., SCPA 719 which dispenses with process and discovery in removing fiduciaries,[9] and SCPA 711, which does *not* require removal on the enumerated grounds, and SCPA 2110, which gives the Surrogates control over beneficiaries' estate interests. However, prior usage of SCPA §506 had been (upon *consent*) to appoint Judicial Hearing Officers ("JHO's") or staff court attorneys under SCPA §506, which imposed no costs on the parties, and did not put the referee in the effective position of being an employee of a party. The legislative history of SCPA §506 indicates consent is necessary for the references. (See 49a)

Because a trial by a private attorney (clandestinely prepaid by a party) without consent, in lieu of a trial by a duly constituted court or jury, is so fundamentally abhorrent to the due process and equal protection requisites of the U.S. Constitution, this is a matter of utmost federal importance.

It is also fundamental to our system of jurisprudence and the rights of the citizens of this country that all citizens be afforded due process and equal protection regardless of wealth. Thus, "the wealthy" have no lesser rights to a fair trial and "the

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9. The petitioner was removed pursuant to SCPA §719.

wealthy" should not have to submit to a significantly more expensive yet defective legal process than do ordinary citizens. It is a violation of due process and equal protection of the laws to subject "the wealthy" to hearings by privately paid referees without consent and at great cost. In our system of jurisprudence access to a judge or jury is not to be denied on the basis of wealth or lack of wealth. There is no countervailing state interest to justify so egregious an incursion on a litigant's constitutional rights in contravention of the purpose of the statute (49a).

Because the Internal Revenue Service is denied vast amounts of tax revenues when the cumulative effect of these estate administrative expenses[10] are considered, this petition goes well beyond petitioner's individual interests and the case at bar.

This is a case that this Court should undoubtedly hear.

In enacting SCPA §506 the legislature made clear in its legislative history that privately paid attorneys were not to be appointed without consent. NY CLS SCPA §506 notes. (at 49a-50a) Indeed, in this estate, a JHO had previously served in 1990 in a minor matter at no cost to the parties and with consent. The court has since 1994 imposed approximately $300,000 in referee fees [so far] in this estate, without the consent of the parties. This is unconstitutional as violative of the due process rights conferred by the Fifth and Fourteenth Amendments to the U.S. Constitution. Moreover, the imposition of the Referee resulted in other additional costs and burdens of litigation and drastically prolonged the proceeding.

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10. Even were the estate tax to be entirely eliminated, which is unlikely, estate income taxes will continue and individual states may retain estate taxes. Moreover, any phase out of estate taxes would leave the taxes extant to some degree for years.

Furthermore, the conduct of the proceedings which culminated in surcharges with interest of almost $2,000,000 without proof of any loss to the estate, was inherently lacking in due process. The content of the underlying decision (at 28a *et seq.*) has irreparably damaged petitioner's professional and personal reputation and affects her professional prospects. Cf. *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971) at 404 U.S. 197. Moreover, the right to a fair trial is a fundamental due process right unlike appellate rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed. 2d 473 (1996) at 519 U.S. 114.

New York law has not allowed privately paid referees to be imposed on litigants without consent in its general courts. In targeting probate litigants for lesser rights (in contravention of SCPA 506's legislative history), the New York courts had denied petitioner her equal protection rights. See, e.g., *Ploski v. Riverwoods Owners Corp.*, 255 A.D.2d 24 (2d Dept. 1999), CPLR 3104. Nor do probate judges in other counties impose referees to try accounting hearings without consent.

As applied, SCPA 506 did not meet the lowest level of presumable due process or equal protection scrutiny. The selection of petitioner's litigation as one to be adjudicated by a private attorney was not related to a legitimate state interest. Patronage appointments are not a legitimate state interest. Moreover, the Referee was imposed on the basis of the wealth of the estate and not on the basis of the complexity of the matter.

If the orders below are allowed to stand, they will allow New York to impose private referees who were unsworn, prepaid by an adversary, with extensive conflicts of interest, to serve in lieu of judges in matters involving millions of dollars. No citizen should be deprived of millions of dollars in a

proceeding which does not provide the minimal standards of due process and a fair hearing. Where the referee (and courts) even ignored the parties' stipulations[11] there certainly was not a scintilla of due process. Nor should a litigant lose her reputation and professional prospects without a fair trial.

The use of private attorneys results in determinations by the probate judge who never heard the witnesses and had no basis to determine the credibility of witnesses, and leaves the judge unfamiliar with the hearing.

The factual confusion in the Surrogate's July 1997 decision (28a to 38a) is indicative that petitioner was denied a fair trial. The Referee was not the decision maker. The Surrogate was. Yet the Surrogate was clearly unfamiliar with the facts and ignored key stipulations. Because the Surrogate's July 1997 decision reflects confusion as to the underlying facts, it is patently apparent that the failure of the Court to conduct the hearing herself materially affected the outcome and petitioner's rights. For instance, the Surrogate mistakenly believed MFDDS had acted as BNY's counsel at the 1990 removal hearing. The Surrogate also was unaware that there had been no witnesses or evidence of mismanagement of the companies by petitioner. *Inter alia*, the Surrogate also misstated the end-date of the accounting. A Court that does not know the rest date of the accounting should not determine damages. The Surrogate was confused about the claims related

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11. BNY had stipulated that FMI had a certificate of deposit valued at $275,000 on the rest date of the accounting (January 31, 1990) (TR: 6/9/94 p. 150 at A-920), and that FMI had $37,377.57 in the bank (TR: 6/15/94 pp. 146, 146 at A-1133). BNY had itself valued FMI's inventory at $262,000 as of December 31, 1989 (A-3681, 3761 *et seq.*), one month earlier; with few sales shipped in January. The balance on the loan to JMI also had some value. The Referee chose to ignore the stipulations and value of FMI's and JMI's inventory, cash, accounts receivable, fleet of autos, machinery and equipment.

to the fees of Rosen, Szegda, Preminger and Bloom. The Surrogate also mistakenly attributed the drop in JMI's performance after 1984 to petitioner by erroneously assuming decedent's stroke and petitioner's control over JMI occurred in 1985. This indicates confusion as to proximate cause of the Surrogate's other presumptions of loss. While the Referee claimed that he did not consider BNY's key exhibit, BNY Exhibit #39, in his report (p. 100 at A-142), and while he acknowledged its questionable reliability, BNY's experts Mallarkey and Roloff *did* rely on BNY Exhibit #39. Since the Referee in turn adopted the BNY experts' opinions, which opinions were based on BNY Exhibit #39, it cannot be disputed that the improper admission of BNY Exhibit #39 fatally tainted the hearing. Yet the Surrogate ignored the issue of BNY Exhibit #39.[12] Indeed, the Surrogate stated there was an "uncontroverted loss" (37a) despite 8 years of controversy over the issue.

In *United States v. Kras*, 409 U.S.434, 93 S.Ct. 631, 34 L.Ed. 2d 626 (1973) this Court held that there is a due process right of access to the courts when fundamental rights are at issue and a State exclusively controls adjusting the legal relationships involved. 409 U.S. at 445. Here, the Surrogate's Court and State have exclusive control over an executor's accounting.

12.BNY counsel Streng claimed the handwritten unsigned BNY #39 was prepared by the JMI staff (TR: 6/20 p. 150 at A-1311), in early 1990 (TR: 6/20 p. 151 at A-1312) under the supervision of a CPA firm (TR: 6/20 p. 91 at A-1297). In fact, it was prepared in 1991 or 1992 by a per-diem bookkeeper (TR: 12/2 p. 17 at A-1974).As a purported 1989 JMI financial statement it was prepared too late to have been admitted as a business record, as it was. Cf. CPLR 4518. Moreover, other witnesses were examined on BNY #39. Indeed the Surrogate did rely directly on BNY Exhibit 39. The Surrogate stated there was a $6 million loss at JMI(A-34) during petitioner's tenure. The only evidence on which so large a loss could be based was BNY Exhibit #39.

Petitioner has standing to challenge SCPA §506 and its application. Indeed, under the standard used by the New York Court of Appeals, no litigant would ever be able to challenge SCPA §506.

I. CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE REFEREE'S SERVING, AND IN THE HEARING

The constitutional questions presented for review are primarily violations of the Fifth and Fourteenth (§1) Amendments. It is clear the petitioner was denied her constitutional right to a fair hearing and her property, reputation and professional standing were taken from her without due process or equal protection of law.

The due process requirements of the Fifth and Fourteenth Amendments apply to state laws. Where state law is inconsistent with federally guaranteed rights the federal rights are controlling. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S.422, 432, 102 S.Ct. 1148 (1982); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982).

The New York Appellate Division was the last court to review this matter on the merits. That Court did not "find any defect in the referee's services." (4a) It did not address the constitutional issues of a hearing by a referee to hear and report (appointed over petitioner's objection) with decisions made by a judge who did not have a basis to judge the credibility of the witnesses or familiarity with the facts.

In denying petitioner access to a duly constituted judge of the court who could see the witnesses to appraise their credibility petitioner has been denied a constitutional right. It is interesting to note that Surrogate Preminger, who imposed the referee *sua sponte*, has expressed a negative view of hearings by referees. See, e.g., discussion in *Matter of Duke*, 87 NY2d 465, 470, 640 NYS 2d 446, 663 NE2d 602 (1996).

In discussing references, Professor Seigel, a leading scholar on New York practice, states:

> "... the absence of consent is in any event an element to be considered by the court in deciding whether to refer the matter. Other cases indicate that the reference to report is restricted to only that which the parties consent to. *A constitutional argument can be urged against a reference to report made over a party's objection: it can be urged that the party has a right to have the case tried before a duly constituted judge of the court, and that this requirement is not met merely by having the judge review the referee's findings.*

(Emphasis added, footnotes and citations omitted.) Siegel, D., *New York Practice*, 2d Ed. §379, p. 573 and 3d Ed. §379, p. 614.[13]

It has long been the law in New York that a referee could not seek payment until he had filed his report. However, Referee Rudenstine was paid $108,358.50 by BNY five months before he issued his Report. (A-2954-55) (on July 14, 1995). It is well-settled law that a referee has no right to his fees until his duties are completed and his report delivered or filed. *Matter of Robinson*, 187 A.D. 799, 176 N.Y.S. 273, 275 (1st Dept. 1910); *Hebard v. City of New York*, 137 A.D. 752, 122 N.Y.S. 628 (1st Dept. 1910), *Voron v. Chait*, 101 Misc. 366, 167 N.Y.S. 657 (Sup.Ct. N.Y.Co. 1917), aff'd, 183 A.D. 925, 169 N.Y.S. 1117 (1st Dept. 1918); *Ament v. Schubert Piano Co.*, 172 A.D. 423, 158 N.Y.S. 532 (1st Dept. 1916), *Nat'l Bank of North America v. New Paltz Growers, Inc.*, 89 A.D. 2d 647, 453 N.Y.S.2d 124 (3rd Dept. 1982).

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13. This very quotation was cited, e.g., in the Memorandum of Law to the Surrogate dated September 6, 1996 at pp. 15-16.

Indeed, *Robinson, supra,* holds that the payment and acceptance of fees before termination of the reference is sufficient grounds for the referee's *removal,* even absent any showing of prejudice or favoritism toward the party making the payment. Yet the New York Courts ignored that important body of law.

Moreover, multiple misrepresentations by the Referee denied petitioner due process and a fair trial because they affected the findings of fact. *Inter alia,* a) on June 15, 1994 the Referee made a ruling that "Ms. Lefkowitz has presented adequate evidence with regard to the valuations of Floral Masquerade and NVM Capital as of January 31, 1990 to shift the burden to the Bank ...." (TR: 6/15/94 p. 216 at A-1151). This ruling disrupted petitioner from calling witnesses and introducing additional evidence; b) That petitioner should not contest the Greene testimony of benefit to the company until later (A-508). This opportunity was never given; c) That only Greene & Zinner and Shea & Gould fees related to the 1990 removal trial would be considered (TR: 5/12/94 pp. 24 et seq. at A-477 to A-480); d) Assuring petitioner at a pre-hearing conference that she could have a live court reporter transcribe the hearing at her expense (TR: 5/13 p. 8 at A-550). Early in the hearing the Referee ruled there could be no transcription by the live reporter, even if each page were stamped "not official copy" and would not be used in court without permission (TR: 5/17 p. 34 at A-569); and e) The Referee never permitted petitioner to value JMI as of January 31, 1990, the rest day of her accounting. (TR: 5/25/94 pp. 240-44 at A-703-04 and A-4742.)[14]

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14. Petitioner raised the issue of the Referee's misrepresentations repeatedly, e.g., pp. 10-11 of her March 26, 1996 affidavit in her motion to the Surrogate to reject in part the Referee's Report.

The ruling on June 15, 1994 cut petitioner off from calling witnesses or introducing more evidence. Nor was she later permitted to introduce more valuation evidence. Along with the Referee's ruling that petitioner could not value JMI as of January 31, 1990, this crippled her case. The surcharge on the JMI loans represented what was not allocated to the loans by BNY from the December 18, 1990 JMI sale proceeds. It is not controverted that JMI fell in value in 1990. In particular: 1) The spring 1989 appraisal by Touche-Ross was over $13 million (A-3965 to 4020);2) The December 1989 offer was for $6.8 million (AML Exhibit #75 at A-4091) (shortly before January 31, 1990); 3) The June 1990 offer was for about $4.8 million (AML Exhibit #76 at A-4093; TR:6/13 p. 35 at A-993); but 4) the December 1990 sale was for only $2.1 million (with 5% interests given to BNY-allied witnesses) (AML Exhibit #42 at A-4020 *et seq*).

As to (d), it is clear that, as petitioner had warned the Referee, the transcripts of pre-trial conferences from the mechanical recording device were not accurate and even misidentified the speaker (A-2569 to 2631). In fact New York Judiciary Law §290a limits mechanical transcription to cases with two or fewer parties. After the hearing it was too late for petitioner to recognize all errors in identification of speakers - only where it was clear from the context would it be noticeable. Nevertheless, the mechanical transcriber misidentified speakers, see e.g., A-2610, 2616. It seems apparent that in a situation involving 3 law firm fee petitioners and at least 4 other parties, mechanical transcription should not have been used. Thus to have prohibited petitioner from having a live court stenographer, at her own expense (TR:5/17, p. 34 at A-569) in contravention of the Referee's past representations (TR:5/13, p. 8 at A-550), clearly denied petitioner a fair trial. The trial was supposedly open to the

public. Thus the exclusion of the live transcriber raises First Amendment issues as well.

This Court has found that "the Due Process Clause grants the aggrieved party the opportunity to present the case and have its merits fairly judged." *Logan, supra*, 455 U.S. at 433.

Petitioner's rights to almost $2,000,000 in damages assessed against her and her reputation clearly are important interests. The decree below is a final deprivation. This was done without petitioner obtaining meaningful judicial review.

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971) involved the right to access to courts. In particular, the state's imposition on indigents seeking divorce of substantial fees was held to be a denial of due process. This Court held that where interests of basic importance were at issue, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. at 37. In *Logan, supra*, 455 U.S. at 429-430 this Court interpreted *Boddie*: "The Fourteenth Amendment's Due Process Clause has been interpreted as preventing States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the 'equivalent of denying them an opportunity to be heard upon their claimed rights.'" Clearly the Surrogate presiding over a trial is the established adjudicatory procedure, one that was denied to petitioner.

Moreover, in *Boddie, supra*, this Court also stated:
"... Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." 401 U.S. at 379.

Petitioner was required to file her accounting by the Court. Thus full and fair access to customary procedures was a due process right. In the litigation over her accounting, once objections were filed thereto by BNY, petitioner in essence became "a defendant". Thus the due process principles that delimit the rights of defendants apply.

The Courts also erred on the issue of jurisdiction of the Surrogate's court over actions petitioner took as a pre-existing corporate officer (of companies no longer owned by the estate at the time the objections were filed). These were claims by corporations against a former officer, i.e. disputes between "living entities". A case on point is *Matter of Liebowitz*, 34 A.D.2d 750, 310 N.Y.S.2d 529(1st Dept. 1970).See also *Matter of Browning*, 258 A.D. 621, 17 N.Y.S.2d 557(1st Dept. 1940).

The New York Courts also ignored the principle of judicial estoppel. In 1994 the First Department cited petitioner's refusal to agree to seek a million dollar loan to JMI in March 1990 as grounds for her removal. In *this* decision the First Department upheld the improvidence of loans to JMI made in 1989 when JMI was far more financially sound.[15] The doctrine of judicial estoppel or estoppel against inconsistent legal positions holds that a party should be barred from advocating contrary positions in different legal proceedings. *See, e.g., Perkins v. Perkins*, 226 A.D.2d 610, 641 N.Y.S.2d 396 (2d Dept. 1996); *Moore v. County of Clinton*, 219 A.D.2d 131, 640 N.Y.S.2d 927 (3d Dept. 1996), *lv. denied*, 89 N.Y.2d 851 (1996); *Horn v. Bennett*, 253 A.D. 630, 3 N.Y.S.2d 525 (2d Dept. 1938), *app. denied*, 278 N.Y. 736, 16 N.E.2d 804 (1938).

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15. BNY in 1991 and 1994 complained of petitioner's refusal to sign a letter seeking a loan of $1 million for JMI in 1990. Yet in this accounting BNY complains that loans of $1.25 million made in 1989 to JMI (when JMI was in sounder financial condition in 1989) were improvident.

II. AWARD OF $250,000 FROM PETITIONER'S SHARE OF THE ESTATE FOR OTHER PARTIES' ATTORNEY FEES, WITHOUT NOTICE OR A HEARING

The SCPA §2110 fee proceedings of Greene & Zinner and Shea & Gould had sought recovery from the estate (A-2632 and A-2717). There was no notice to petitioner or hearing on the issue of recovery from her estate interest. The 1994 hearing was based on the issue of the entitlement to recovery *from the estate* by a beneficiary for attorneys' fees. Thus petitioner was denied notice and a hearing in derogation of her due process rights. U.S.C.A. Const. Amend.14 & Amend. 5. Moreover, under New York case law petitioner was entitled to a hearing before any legal costs were charged against her. In *Estate of Campbell*, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3d Dept. 1988) the Court held that the fiduciary "must be afforded an opportunity, on remittal, to defend himself" on the question of payment from the fiduciary of the objectants' legal expenses.

Initially, based on the 1994 hearing, both the Referee and the Surrogate had denied the applications of Greene & Zinner and Shea & Gould (A-29 and A-165 to 176). They were granted only on motions to reconsider (A-40).

Petitioner's $250,000 estate interest (plus interest) in her father's estate was a property right to which she was entitled to due process of law before that property was taken from her. The relevant petitions sought recovery from the estate, not petitioner. The 1994 hearing was tried on the basis of recovery from the estate and was defended by the estate counsel. Only after recovery from the estate was denied after the hearing did the beneficiaries' counsel seek recovery from petitioner's interest in the estate. No hearing was held on the matter.

In *Mullane v. Central Hanover Bank & Trust Co.*,339

U.S.306,313,70 S.Ct. 652,94L.Ed.865(1950), this Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

In fact the December 1, 1995 Referee's Report had found that the work by Greene & Zinner for JMI was as volunteers (A-173), a lack of retainer by the temporary administrator and duplication (A-173), and questioned the reasonableness of the amounts sought (A-174 in fn. 276). Moreover, it was an error to compensate Greene & Zinner for services to JMI, a company owned only 50% by the estate, when there was no evidence of retainer by JMI. Greene & Zinner should have sought recovery from JMI. Surely it is error to charge petitioner for volunteer services to JMI.

Nor did the respondents cite an apposite case where beneficiaries recovered their counsel fees from the fiduciary. The fee respondents conceded this was a matter of first impression. There are cases of surcharging the fiduciary *for the estate's expenses* for exposing an errant fiduciary's misconduct. However, there is no case law for charging the fiduciary for a beneficiary's legal expenses in a removal where there is another fiduciary at the time, the temporary administrator (Mr. Salles), whose interests are joined with the beneficiaries and estate.

Nevertheless, the New York Appellate Division stated:

> "The challenged awards of attorney fees were proper exercises of the Surrogate's 'unquestionably broad discretion' to fix such fees (see *Matter of Urbach*, 252 A.D.2d 318, 322). The services for which the fees were

awarded were related to exposing petitioner's misconduct (*see, Matter of Birnbaum v. Birnbaum*, 157. A.D.2d 177, 191)...."

Matter of Birnbaum v. Birnbaum, supra is inapposite. *Birnbaum* involved recovery *by an estate* of its counsel fees.[16]

Indeed, a beneficiary's right to recoupment of attorney fees had been circumscribed by numerous cases to a requirement that the beneficiary's attorney's efforts resulted in a substantial enhancement of the size of the estate and every beneficiary's interest in the estate. *In re Baxter*, 196 A.D.2d 186, 609 N.Y.S.2d 992 (4th Dept. 1994), *mot. for rearg. or lv. to app. denied*, 1994 N.Y. App. Div. LEXIS 7935 (July 1, 1994); *In re Estate of Scarsella*, 195 A.D.2d 513, 600 N.Y.S.2d 256 (2d Dept. 1993); *Estate of Bellinger*, 55 A.D.2d 448, 451 (4th Dept. 1977); *Matter of Wiltshire*, 4 A.D.2d 981, 167 N.Y.S.2d 852 (3d Dept. 1957);Matter of Lounsberry, 226 A.D. 291, 234 N.Y.S. 680 (4th Dept. 1929). See A-169. These beneficiaries and their attorneys not only did not enhance the estate but reduced it. Thus the beneficiaries were not entitled to recovery from the estate. In fact Mr. Ball conceded that Shea & Gould's efforts had not augmented the estate (TR: 5/11/94 p. 221 at A-408). See also the 1990 JMI financial statement reflecting losses exceeding $4 million after the takeover by Greene & Zinner and Shea & Gould's clients. (A-4209 *et seq.*).

Where the beneficiaries *had to* act because the fiduciary's actions were adverse to the estate and beneficiaries, there can be a recovery. *Matter of Graves*, 197 Misc. 638, 639 (Surr. Monroe Co. 1950); see also *Matter of Smith*, 167 Misc. 95, 98 (N.Y.Sur. 1938). However, as the Referee had found in 1995, here the estate had a pre-existing second fiduciary, the

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[16] Moreover, *Birnbaum* involved fraud.

temporary administrator, Stuart Salles, who had retained Paul, Weiss (A-173). Moreover, Greene & Zinner's and Shea & Gould's clients were mere remaindermen prior to Irene Marsh's death. At the time at issue the only beneficiary was Irene Marsh, who was represented by her own counsel, MFDDS, as well as by a *guardian ad litem*, to safeguard her and the estate's interests. See also *Matter of Hidden*, 243 N.Y.499, 154 N.E. 538 (1926) where the Court of Appeals refused payment to a party (the incompetent's spouse) from the errant fiduciary.

While the Appellate Division cited *Urbach, supra*, for the proposition that a Surrogate has "unquestionably broad discretion" to fix attorney fees, *Urbach* in fact reversed a Surrogate who had charged a beneficiary's estate interest for the attorney fees of the estate. Many appellate decisions indicate that Surrogates have been reversed when, *inter alia*, they have attempted to charge estate counsel fees to a beneficiary (or their interest in the estate) or to allow payment of a beneficiary's counsel fees from an estate. *See, e.g., Matter of Dillon*, 28 N.Y.2d 597, 268 N.E.2d 646, 319 N.Y.S.2d 850 (1971); *Matter of Urbach*, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3d Dept. 1999); *Matter of Lounsberry*, 226 A.D. 291, 234 N.Y.S. 680 (4th Dept. 1929); *In re Baxter*, 196 A.D.2d 186, 609 N.Y.S.2d 992 (4th Dept. 1994), *mot. for rearg. or lv. to app. denied*, 1994 WL 370943, *leave to appeal denied*, 84 N.Y.2d 808 (1994); and *Matter of Wilhelm*, 88 A.D.2d 6, 452 N.Y.S.2d 957 (4th Dept. 1982). It should be noted that *Dillon* is a Court of Appeals decision which did *not* permit charging the beneficiary's estate interest.

For a beneficiary to recover for his counsel fees the law of New York had required augmentation of estate assets or acting where the fiduciary's interests were adverse to the estate's. At the time of the removal, petitioner was suspended and Stuart Salles was the sole fiduciary. His interests were not

adverse to the estate's. Thus neither criterion was applicable. Where the beneficiary's attorney's services merely tend to prevent a decrease of the estate, there is no entitlement to compensation. *Estate of Heilbronner*, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr.Ct. N.Y.Co. 1963).

The New York courts created new law without notice and a hearing on the issue. The State of New York should not deprive a citizen of her property without due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Adrienne Marsh Lefkowitz
323 South Doheny Drive, #207
Los Angeles, CA 90048
(917) 414-9400
(310) 247-9647
Petitioner *Pro Se*

March 19, 2001

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of December 2000

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 1401 SSD 82
In the Matter of Nicholas Marsh, etc.,

Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

In the Matter of Shea & Gould, etc.,

In the Matter of Greene & Zinner, P.C., etc.

Adrienne Marsh Lefkowitz,

Appellant,

Claudia M. Appelbaum, et al.

Respondents,

The Bank of New York, etc.,

Objectant-Respondent,

Schulte, Roth & Zabel, et al.,

Fee Petitioners-Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as taken from the Appellate Division order denying appellant's motion to enlarge the record, and the Appellate Division order denying appellant's motions, for reargument and leave to appeal to this Court, be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that such orders do not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

S/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Sullivan, J.P., Tom, Rubin, Saxe, Buckley, JJ.

2148 In re Estate of Nicholas Marsh, etc.,
Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

Application of Shea & Gould, etc.,

Application of Greene & Zinner, P.C., etc.

Adrienne Marsh Lefkowitz,
Petitioner-Appellant,

Pro Se

Claudia M. Appelbaum, et al.,
Respondents-Respondents.

Arthur M. Neiss
S. Timothy Ball

The Bank of New York, etc.,
Objectant-Respondent.

Robert M. Redis

Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

Arthur M. Neiss

Decree, Surrogate's Court, New York County (Eve Preminger, S.), entered April 27, 1998, which, on objectant's motion, *inter alia* confirmed a referee report in part and rejected it in part, fixed legal fees for the law firm of Greene & Zinner, P.C., in principal amount of $174,000 fixed fees for the firm of Shea and Gould in the principal amount of $76,000, and settled and allowed petitioner's account as preliminary executrix, as adjusted pursuant to certain objections, with related relief, unanimously affirmed, with costs.

The challenged awards of attorney fees were proper exercises of the Surrogate's "unquestionably broad discretion" to fix such fees (*see, Matter of Estate of Urbach,* 252 AD2d 318, 322). The services for which the fees were awarded were related to exposing petitioner's misconduct (*see, Matter of Birnbaum v. Birnbaum,* 157 AD2d 177, 191, which has previously been noted by this Court (*see, Estate of Marsh,* 173 Ad2d 336, *appeal dismissed* 78 NY2d 990). We do not agree with petitioner that the proceedings were affected by judicial bias (*cf., Schrager v. New York Univ.,* 227 AD2d 189), nor do we find any defect in the referee's services. The bulk of petitioner's arguments on appeal are factual, and we decline to disturb the referee's findings of fact, accepted by the Surrogate, since those findings and the conclusions drawn therefrom rest upon a fair interpretation of the evidence (*cf., Estate of Clines,* 226 AD2d 269, *lv dismissed* 88 NY2d 1016). We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: October 26, 1999

S/ Catherine O'Hagan Wolfe
Clerk

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 8, 2000.

Present: Hon. Joseph P. Sullivan, Justice Presiding
Peter Tom
Israel Rubin
David B. Saxe
John T. Buckley, Justices.

In re Estate of Nicholas Marsh, etc.,
Deceased.

M-7708
M-7913
File No. 1980/88

Accounting of Adrienne Marsh Lefkowitz, etc.,

Application of Seha & Gould, etc.,

Application of Greene & Zinner, P.C.,

* * * *

Adrienne Marsh Lefkowitz,
Petitioner-Appellant,

Claudia M. Appelbaum, et al.,
Respondents-Respondents.

The Bank of New York, etc.,
Objectant-Respondent.

Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

Petitioner-appellant, Adrienne Marsh Lefkowitz, having moved by separate motions for reargument of the decision and order of this Court entered on October 26, 1999 (Appeal No. 2148) (M-7708), and for leave to appeal to the Court of Appeals from said order (M-7913),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions are denied, each with one bill of $100 costs payable to the responding parties.

ENTER:

S/ Catherine O'Hagan Wolfe
Clerk

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department of the County of New York, on July 15, 1999.

Present: Hon. Joseph P. Sullivan, Justice Presiding,
Milton L. Williams
Angela M. Mazzarelli
Alfred D. Lerner
Israel Rubin, Justices.

In the Matter of the Accounting of Adrienne Marsh Lefkowitz as Former Preliminary Executrix of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh, *Deceased.*

M-4212

File No. 1980/88

Application of Shea & Gould, Attorneys for Loretta M. Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, *Deceased.*

Surrogate's Court New York County

Application of Greene & Zinner, P.C.,
Attorneys for Claudia Marsh Appelbaum,
Remainder Beneficiary of the Estate of
Nicholas Marsh a/k/a Nicholas V. Marsh,
to Fix their Fees and to Receive Payment
of Such Fees from the General Assets of
the Estate of Nicholas Marsh,

Deceased.

----------x

Petitioner-appellant Adrienne Marsh Lefkowtiz, in connection with her appeal from an order of the Surrogate's Court, New York County, entered on or about April 27, 1998, having moved this Court for an order enlarging the record on appeal to include certain documents and for an extension of time to submit her responding brief,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is

ORDERED that the motion be and the same hereby is denied.

ENTER:

S/ Catherine O'Hagan Wolfe
Clerk

At a Surrogate's Court held in and for the County of New York, at 31 Chambers Street, in the City and County of New York, on the 23rd Day of April 1998.

File No. 1980/88

DECREE ON PRELIMINARY EXECUTOR'S ACCOUNTING

Present:

Honorable Eve Preminger, Surrogate.

---x

Accounting of Adrienne Marsh Lefkowitz as Former Preliminary Executrix of the Estate of

NICHOLAS MARSH
a/k/a Nicholas V. Marsh,

Deceased.

---x

Application of SHEA & GOULD, Attorneys for LORETTA M. FINE and LAUREN FINE, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix her Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, Deceased.

---x

Application of GREENE & ZINNER. P.C.,
Attorneys for CLAUDIA MARSH APPELBAUM,
Remainder Beneficiary of the Estate of
Nicholas Marsh, a/k/a Nicholas V. Marsh,
to Fix her Fees and to Receive Payment
of Such Fees from the General Assets
of the Estate of Nicholas Marsh, Deceased.

---

(1) Adrienne M. Lefkowitz, the aforesaid Preliminary Executor, by an accounting dated December 21, 1990, has accounted for her acts and proceedings as such Preliminary Executor and presented a petition to the Surrogate for a judicial settlement of such account for the period beginning March 15, 1988 and ending January 31, 1990 ("Adrienne M. Lefkowitz's Accounting") and at least seven months having elapsed since the granting of Preliminary Letters Testamentary to her, and the time to present claims against said estate having expired; and a Citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 22nd day of August, 1991, at nine-thirty o'clock in the forenoon of that day, then and there to attend such judicial settlement; and the said Citation having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York as preliminary executor of the Estate of Irene B. Marsh and as the named successor executor and trustee and preliminary executor under the Will of Nicholas V. Marsh, Claudia M. Appelbaum; Loretta M. Fine; Lauren Fine; Julie Lefkowitz; and Stuart Salles as temporary administrator of the Estate of Nicholas V. Marsh; and the Petitioner Preliminary Executor, Adrienne M.

Lefkowitz, having appeared *pro se* in the proceeding, and the Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P., and Claudia M. Appelbaum having appeared by her attorneys, Green & Zinner, P.C., and Loretta M. Fine having appeared initially by Shea & Gould, but Shea & Gould having been dissolved and Rivkin, Radler and Kremer and S. Timothy Ball having subsequently appeared for Loretta M. Fine and Stuart Salles having appeared in the proceeding *pro se,* and a verified answer to the Preliminary Executor's petition and objections dated August 21, 1991 to Adrienne M. Lefkowitz's Accounting having been filed by the Bank of New York, as fiduciary of the Will of Nicholas V. Marsh, and such answer and objections having been amended through an amended answer and objections dated July 22, 1993 ("The Bank of New York's Objections"), and Adrienne M. Lefkowitz having filed a reply to the amended objections dated August 23, 1993:

(2) Schulte, Roth & Zabel, L.L.P. (formerly known as Schulte, Roth & Zabel), by a petition dated August 17, 1989, having sought an order fixing the fees and disbursements of Schulte, Roth & Zabel, L.L.P. payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated August 24, 1989, directed to Adrienne M. Lefkowitz, as then acting preliminary executor of the Estate, and Stuart Salles, as then acting temporary administrator of the Estate, citing and requiring them each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 29th day of September, 1989 at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh, and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon Adrienne M.

Lefkowitz and Stuart Salles, and Adrienne M. Lefkowitz having appeared by her attorneys, Etra & Etra, and a verified answer and counterclaim to the petition of Adrienne M. Lefkowitz dated September 28, 1989 having been filed, and a verified answer to counterclaim dated October 17, 1989 having been filed by Schulte, Roth & Zabel, L.L.P., and The Bank of New York, as successor executor of the Estate of Nicholas V. Marsh, having appeared in this proceeding by its attorneys, McCarthy, Fingar, Donovan, Drazan & Smith, L.L.P.; and William D. Zabel of the law firm of Schulte, Roth & Zabel, L.L.P. having filed an affidavit of legal services sworn to October 21, 1991 in the within accounting proceeding;

(3) Greene & Zinner, P.C. by a petition dated October 26, 1992, having sought an order fixing the fees and disbursements of Greene & Zinner, P.C. payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated November 4, 1992, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 8th day of December, 1992, at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh; and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York as preliminary executor of the Estate of Irene B. Marsh and as executor and trustee under the Will of Nicholas V. Marsh; Adrienne M. Lefkowitz; Loretta M. Fine; Lauren Fine; Julie Lefkowitz; and Greene & Zinner, P.C. having appeared *pro se* in this proceeding and Adrienne M. Lefkowitz having appeared *pro se* in this proceeding and The Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith,

L.L.P., and Loretta M. Fine having appeared initially by Shea & Gould, but Shea & Gould having been dissolved and Rivkin, Radler and Kremer and S. Timothy Ball having subsequently appeared for Loretta M. Fine, and a verified answer to the petition dated December 10, 1992 having been filed by The Bank of New York, and a verified answer to the petition dated November 25, 1992 having been filed by Adrienne M. Lefkowitz, and Adrienne M. Lefkowitz having filed an affidavit in opposition to affidavit of legal services sworn to November 25, 1992 and the Court having made a decision and order dated January 12, 1993 consolidating the proceeding to fix fees of Greene & Zinner, P.C. with the proceeding of Adrienne M. Lefkowitz to approve her accounting as preliminary executor of the Estate of Nicholas V. Marsh;

(4) Shea & Gould by a petition dated January 27, 1992, having sought an order fixing the fees and disbursements of Shea & Gould payable out of the Estate of Nicholas V. Marsh, and the Court having executed an order dated February 3, 1992, directed to all persons interested in the estate of the said deceased, citing and requiring them and each of them to be and appear before the said Surrogate at 31 Chambers Street, in the City and County of New York on the 18th day of February, 1992, at ten o'clock in the forenoon of that day, and show cause as to why such fees and disbursements should not be fixed and determined and payable by the Estate of Nicholas V. Marsh; and the said order to show cause having been returned with waivers and consents and/or proof of due service thereof upon The Bank of New York, as preliminary executor of the Estate of Irene B. Marsh and as preliminary executor and as the named successor executor and trustee under the Will of Nicholas V. Marsh; Adrienne M. Lefkowitz; Claudia M. Appelbaum; Lauren Fine; Julie Lefkowitz; and Shea & Gould having appeared *pro se* in this proceeding, and Adrienne M. Lefkowitz

having appeared *pro se* in this proceeding, and The Bank of New York having appeared by its attorneys, McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P., and Claudia M. Appelbaum having appeared by Greene & Zinner, P.C., and a verified answer to the petition dated February 24, 1992 having been filed by The Bank of New York, and a verified answer to the petition dated February 11, 1992 having been filed by Adrienne M. Lefkowitz, and Adrienne M. Lefkowitz having filed an affidavit in opposition to affidavit of legal services sworn to February 11, 1992, and the Court having made a decision and order dated October 21, 1992 consolidating the proceeding to fix fees of Shea & Gould with the proceeding of Adrienne M. Lefkowitz to approve her accounting as preliminary executor of the Estate of Nicholas V. Marsh;

And the Court having rendered a decision and order dated January 27, 1994 appointing David Rudenstine as Referee ("the Referee") to hear and report in these proceedings, and The Bank of New York having filed a Proposed Findings of Fact and Conclusions of Law dated March 30, 1995, and Adrienne M. Lefkowitz having filed a Proposed Findings of Fact and Conclusions of Law dated March 31, 1995, and Adrienne M. Lefkowitz having filed a Response dated May 3, 1995 to The Bank of New York's Proposed Findings of Fact and Conclusions of Law, and a hearing having taken place before the Referee, and the transcripts of proceedings before the Referee having reflected various rulings as to discovery and other trial motions and applications and withdrawals and/or adjustments in The Bank of New York's Objections, and the Referee having filed his report dated December 1, 1995 ("Report of the Referee"), and by Notice of Motion dated March 30, 1995 and affidavit sworn to March 27, 1995. Adrienne M. Lefkowitz having moving [sic]for directed verdict as to certain issues in these proceedings and The Bank of New

York having opposed such motion; and by Notice of Motion dated March 29, 1996 and affidavit sworn to March 26, 1996, Adrienne M. Lefkowitz having moved to confirm in part and reject in part the Report of the Referee and for other relief and The Bank of New York having opposed such motion; and by affidavit sworn to August 31, 1996, Adrienne M. Lefkowitz having offered further support of her motion and by Notice of Motion dated May 29, 1996 and the affidavit of Robert M. Redis sworn to May 29, 1996. The Bank of New York having moved to confirm in part and reject in part the Report of the Referee; and by affidavit of Adrienne M. Lefkowitz sworn to May 20, 1996. Adrienne M. Lefkowitz having opposed such motion; and the affidavit of Robert M. Redis sworn to September 6, 1996. The Bank of New York having offered further support for its motion; and the Court having rendered a decision in writing dated July 29, 1997;

By Notice of Motion dated August 25, 1997, Greene & Zinner, P.C. having moved for reargument and reconsideration of this Court's decision dated July 29, 1997, and upon reading and filing the Notice of Motion dated August 25, 1997 and the affidavit of Andrew Greene sworn to August 25, 1997 in support of such motion; the affidavit of Adrienne M. Lefkowitz sworn to September 5, 1997 in opposition to such motion, and the affirmation of S. Timothy Ball dated September 11, 1997 in response to such motion; and the affidavit of Robert Redis sworn to September 9, 1997 in response to such motion, and the affidavit of Andrew Greene sworn to September 11, 1997 in further support of such motion;

By Notice of Motion dated September 11, 1997, S. Timothy Ball, formerly of Shea & Gould, having moved for reargument and reconsideration of this Court's decision dated July 29, 1997 as to fixation of fees of Shea & Gould, and upon reading and filing the Notice of Motion dated September 11,

1997 and affirmation of S. Timothy Ball dated September 11, 1997 in support of such motion, the affidavit of Adrienne M. Lefkowitz sworn to September 16, 1997 in opposition to such motion; and the affidavit of S. Timothy Ball sworn to September 24, 1997 in further support of such motion;

By Notice of Motion dated September 22, 1997, Adrienne M. Lefkowitz having moved for reargument and reconsideration of this Court's decision dated July 29, 1997, and upon reading and filing the Notice of Motion dated September 20, 1997, the affidavit of Adrienne Marsh Lefkowitz sworn to September 30, 1997, the affidavit of Robert M. Redis sworn to October 3, 1997 in opposition to such motion, the affidavit of Adrienne M. Lefkowitz sworn to October 8, 1997 in further support of such motion;

And the Court having rendered a decision in writing dated February 2, 1998 and appearing in the February 6, 1998 issue of the New York Law Journal and the said matter having been duly adjourned to this day.

Now, upon the motion of McCarthy, Fingar, Donovan, Drazen & Smith, L.L.P, it is

ORDERED, ADJUDGED AND DECREED, that except as otherwise stated in this decree, the Report of the Referee is confirmed in all aspects; and it is

ORDERED, ADJUDGED AND DECREED, that the motion of Adrienne M. Lefkowitz for reargument and reconsideration of this Court's decision dated July 29, 1997 is denied in all respects, and if is further

ORDERED, ADJUDGED AND DECREED, that the motion of the law firm Greene & Zinner, P.C. for reargument and reconsideration of the Court's decision dated July 29, 1997 is granted and the petition for legal fees of the law firm of Greene & Zinner, P.C. is granted to the extent that the legal fees for such firm are fixed and determined in the amount of

$174,000, plus simple interest at the rate of 9% from the date of this Court's February 2, 1998 decision, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such amount and shall charge such amount against the distributable share of Adrienne M. Lefkowitz; and it is further

ORDERED, ADJUDGED AND DECREED, that the motion of S. Timothy Ball for reargument and reconsideration of this Court's decision dated July 29, 1997 as to the legal fees of Shea & Gould is granted and the petition for legal fees of the law firm of Shea & Gould is granted to the extent that the legal fees of Shea & Gould are fixed and determined in the amount of $76,000, plus simple interest at 9% from the date of this Court's February 2, 1998 decision, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such amount and shall charge such amount against distributable share of Adrienne M. Lefkowitz; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #7 of The Bank of New York's Objections is partially sustained and Schedules A and G of Adrienne M. Lefkowitz's Accounting are hereby revised to indicate a value of zero for the decendant's "Personal Property" in the Sherry Netherland's deposit box and personal property; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(a) of The Bank of New York's Objections is partially sustained and Schedule A of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a value os $48,644.13 for the decedent's interest in Marsh Oil Associates; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(b) of The Bank of New York's Objections is sustained and Schedule A-1 of Adrienne M. Lefkowitz's

Accounting is hereby revised as follows: to describe the moneys realized as a collection of the decedent's interest in Marsh Oil Associates on November 3, 1989, and to describe an inventory Value of $48,644.13 and Proceeds or Distribution Value of $48,644.13 for the decedent's interest in Marsh Oil Associates, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #8(c) of The Bank of New York's Objections is partially sustained to Schedule F of Adrienne M. Lefkowitz's Accounting to the extent that $21,136.51 of Davies & Co., Inc.- Loan for Marsh Oil Associates on Schedule F. pages 1 and 3, are recharacterized as disbursements on Schedule C of Adrienne M. Lefkowitz's Accounting, and the disbursement of estate assets to Davies & Co., Inc. on December 21, 1988, in the amount of $3,708.07 on March 10, 1989, in the amount of $1,358.42 on May 18, 1989, in the amount of $1,608.12 on August 16, 1989, in the amount of $1,347.36 and on September 18, 1989, in the amount of $5,074.35 are disallowed and Adrienne M. Lefkowitz is surcharged and directed to pay The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $13,095.32 plus simple interest calculated at the rate of 3.5% from the dates of the disallowed disbursements to date of this Court's July 29, 1997 decision and thereafter at the rate of 9% and the disbursement of estate assets to Davies & Co., Inc. on July 28, 1988 and September 1, 1988 in the aggregate amount of $8,040.19 shall be allowed; and that Schedule G of Adrienne M. Lefkowitz's Accounting shall reflect a receivable for such disallowed expenses in the amount of $13,095.32, plus interest, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #18 of The Bank of New York's Objections is sustained to Schedule C of Adrienne M. Lefkowitz's Accounting and the disbursement of estate assets to Joseph

Markovits, Inc. on May 6, 1988 in the amount of $2, 563.63 is disallowed and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $2,563.63, plus simple interest calculated at the rate of 3.5% from the date of the disallowed disbursement to the date of this Court's July 29, 1997 decision and thereafter at 9% and that Schedule G of Adrienne M. Lefkowitz's Accounting shall reflect a receivable for such disallowed expense in the amount of $2,563.63, plus interest, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #20 of The Bank of New York's Objections is partially sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting in which Adrienne M. Lefkowitz seeks reimbursement of expenses for "funeral, legal and other estate expenses" in the amount of $58,408.77 and that portion of these expenses for Funeral Expenses, Transcripts and Other Administration Expenses in the aggregate amount of $27,532.74 are hereby approved and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay to Adrienne M. Lefkowitz $27,532.74; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #22 of The Bank of New York's Objections is sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting entitled "Graham & James, Hong Kong attorneys - $4,164.08 and the request for approval of attorney fees of Graham & James, Hong Kong Attorneys, is hereby disallowed in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #24 and 25 of The Bank of New York's Objections is sustained t that portion of Schedule C-1 and D of Adrienne M. Lefkowitz's Accounting in which she seeks approval of claims for services rendered during the decedent's lifetime and

after his death to Joseph Markovits, Inc.and Floral Masquerade, Inc. in the aggregate amount of $1,295,860, and such claims are disallowed in their entirely; and it is further.

ORDERED, ADJUDGED AND DECREED, that Objection #36 of The Bank of New York's Objections is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #26 of The Bank of New York's Objections is partially sustained as to payments made to the Hong Kong Inland Revenue Department for penalties on October 8, 1992 in the amount of HK$100,000 and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of HK$100,000, plus simple interest calculated at the rate of 3.5% from October 8, 1992 to date of this Court's July 29, 1997 decision and thereafter at 9%, and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #27 and #28 of The Bank of New York's Objections are sustained as to Schedule F of Adrienne M. Lefkowitz's Accounting to the extent of disbursements of estate assets to Floral Masquerade, Inc. on June 22, 1988 in the amount of $500,000 and to NVM Capital Corp. on June 22, 1988 in the amount of $1,000,000, and Adrienne M. Lefkowitz is surcharged and directed to pay to The Bank of New York, as executor of the Estate of Nicholas V. Marsh, the sum of $1,214,000, plus simple interest calculated at the rate of 3.5% from October 6, 1989 to date of this Court's July 29, 1998 decision and thereafter at 9%, and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #31 of The Bank of New York's Objections is sustained and Schedule G of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a fair market value as of January 31, 1990 of less than $150,000 for the decedent's

interest in NVM Capital Corp.; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #29 of The Bank of New York's Objections is sustained and Schedule G of Adrienne M. Lefkowitz's Accounting is hereby revised to indicate a fair market value as of January 31, 1990 of $175,000 for the decedent's interest in Floral Masquerade, Inc.; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #32 of The Bank of New York's Objections is sustained and Schedules E and E-1 are hereby revised to strike the portions thereof in which distributions made to Irene B. Marsh during her lifetime are to be treated as advances and repaid to the Estate of Nicholas V. Marsh; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #19 of The Bank of New York's Objections is sustained to that portion of Schedule C-1 of Adrienne M. Lefkowitz's Accounting in which she seeks receiving and paying commissions as preliminary executor of the estate in the aggregate amount of $102,264.47, and such claim is disallowed in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that Objection #12(b) of The Bank of New York's Objections is overruled and the unpaid legal fees of the law firm of Schulte, Roth & Zabel, L.L.P, are fixed and determined in the amount of $55,792.30 plus simple interest at 9% from the date of this Court's July 29, 1997 decision and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fees; and it is further

ORDERED, ADJUDGED AND DECREED, that Objections #13 of The Bank of New York's Objections in relation to legal fees paid to the law firm of Kaye, Scholer, Fierman, Hays & Handler is overruled; and it is further

ORDERED, ADJUDGED AND DECREED, that the fee of Robert N. Swetnick, Esq., as Referee, is hereby fixed and determined in the amount of $6,750, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fee; and it is further

ORDERED, ADJUDGED AND DECREED, that the claim in Schedule K of Adrienne M. Lefkowitz's Accounting in which Adrienne M. Lefkowitz seeks damages as a result of temporary restraining orders imposed on January 31, 1990 is denied, and it is further

ORDERED, ADJUDGED AND DECREED, that the cross motion of The Bank of New York for sanctions in relation to the motion in 1991 of Adrienne M. Lefkowitz for reargument and/or renewal of her removal as preliminary executor is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that the motion of Adrienne M. Lefkowitz for a directed verdict dismissing portions of The Bank of New York's Objections is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED, that the unpaid accounting fees of Hoberman, Miller & Co. are fixed and determined in the amount of $8,635, and The Bank of New York, as executor of the Estate of Nicholas V. Marsh, is hereby directed to pay such fee; and it is further

The said Surrogate, after having examined the said account and determining said motions, finds the state and condition of the said account to be as stated and set forth in the following Summary Statement thereof, made by the said Surrogate as judicially settled and adjusted by her to be recorded with and taken to be a part of the Decree in this matter, to wit:

A Summary Statement of the Account of ADRIENNE M. LEFKOWITZ as Preliminary Executor of the Estate of NICHOLAS V. MARSH, deceased, made by the Surrogate as

judicially settled and allowed.

The said Preliminary Executor shall be charged with:

The amount of Schedule "A".	$6,247,160.43
The amount of Schedule "A-1"	13,650.00
The amount of Schedule "A-2"	181,828.87
	6,442,639.30

The said Preliminary Executor shall be credited with:

The amount of Schedule "B"	$ 5,442.00
The amount of Schedule "C"	253,961.36
The amount of Schedule "C-2"	34,866.06
The amount of Schedule "D"	533,265.64
The amount of Schedule "E"	373,000.00
The amount of Schedule "E-1"	142,000.00
	$1,342,635.06

in cash, leaving a balance in her hands of principal consisting of $504,484.43 receivables of $15,659.95 and $4,574,897.05 in other property making in all the sum of $5,095,041.43 as shown by Schedule "G" of said accounting: and a balance of income consisting of $4,962.81 in cash as a shown by Schedule "G-1" of said account, making a combined total of principal and income in the amount of $5,110,004.24.

AND the Preliminary Executor's account having been adjusted by the Surrogate and a summary of the same having been made as above and herewith recorded, it is

ORDERED ADJUDGED AND DECREED, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted; and it is further

ORDERED, ADJUDGED AND DECREED, that out of the balance of principal and income so found, as above the

Preliminary Executor shall distribute to The Bank of New York as executor of the Estate of Nicholas V. Marsh the remaining principal and income; and it is further.

ORDERED, ADJUDGED AND DECREED, that upon complying with the provision of this Decree, said Preliminary Executor, in her own right and as Preliminary Executor aforesaid, be and she is hereby discharged from any and all further liability, responsibility and accountability with respect to any and all matters as set forth in said account and in this Decree.

S/ Eve Preminger
Surrogate

New York Law Journal
February 6, 1998, Friday

SECTION: COURT DECISIONS; Pg. 27

NEW YORK COUNTY SURROGATE'S COURT

Surrogate Preminger

ESTATE OF NICHOLAS MARSH, a/k/a NICHOLAS V. MARSH, Deceased. -- Adrienne Marsh Lefkowitz ("Lefkowitz") and the attorneys for the beneficiaries move for reargument of the Court's July 29, 1997 decision, which confirmed in part and rejected in part the report of the Referee in this contested accounting.

Lefkowitz' motion for reargument is denied. Her papers contest issues previously decided, and fail to demonstrate that the Court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (See, Pahl Equipment Corp. v. Kassis et al, 182 AD2d 22; Schheider v. Solowey, 141 AD2d 813).

The attorneys for the beneficiaries have established, however, that the Court underestimated the extent to which their services benefitted this estate in the removal proceeding and in the identification of estate assets. Greene & Zinner, counsel for Claudia Marsh Applebaum, acted as lead counsel in the removal proceeding. The firm prepared for and presented evidence at the removal proceeding concerning Lefkowitz' alleged mismanagement of the estate. In addition, it appears that Greene & Zinner were responsible for investigating and

identifying estate assets. some of which were ultimately located in Hong Kong. Moreover, they assisted in the management of the estate corporations after Lefkowitz was removed. As for Shea & Gould, the attorneys for Loretta and Lauren Fine, the firm actively participated in the removal proceeding and aided in the ultimate result.

Accordingly, the motions for reargument by the attorneys for the beneficiaries are granted, and upon reargument the report of the referee is modified to the extent that the fees of Greene & Zinner are fixed in the sum of $ 174.000 and the fees for Shea & Gould are fixed in the sum of $ 76.000 (Matter of Freeman, 40 NY2d 397; Matter of Potts, 241 NY 593; Matter of Bellinger, 55 AD2d 448). Such fees shall be charged directly against Lefkowitz' share of the estate pursuant to the July 29, 1997 decision. This award is without prejudice to counsel seeking the balance of their fees directly from their clients.

Resettle decree.

Note:
The official version of this decision could not be located at Surrogate's Court.

Surrogate's Court: New York County

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Accounting of Adrienne Marsh Lefkowitz as former Preliminary Executrix of the Estate of

NICHOLAS MARSH,
a/k/a NICHOLAS V. MARSH,

Deceased. File No. 1980/88

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Application of Shea & Gould, Attorneys for Loretta M Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate.

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Application of Green & Zinner, P.C., Attorneys for Claudia Marsh Applebaum, Remainder Beneficiary of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh, to Fix their Fees and to Receive Payment of such Fees from the General Assets of the Estate.

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Preminger, S.

In this contested accounting by the removed preliminary executor, Adrienne Marsh Lefkowitz, the various parties have moved to either confirm in part or reject in part the report of the referee, David Rudenstine, Esq., which was rendered after 48 days of trial. The account is for the period from Ms. Lefkowitz's appointment as preliminary executor on April 25, 1988 through her removal on April 24, 1990 (see, Matter of Marsh, NYLJ, April 24, 1990, at 24, col 5, affd 173 AD2d 336, appeal dismissed 78 NY2d 990; appeal denied 79 NY2d 751).

Nicholas Marsh was survived by his wife, Irene and three daughters, Adrienne Marsh Lefkowitz, Loretta Fine and Claudia Applebaum. Under his will, decedent left the bulk of his estate in a marital trust for Irene's benefit, remainder to his three daughters as follows: 30 % outright to Adrienne, 30 % in further trust for Claudia, 20 % in further trust for Loretta and 20% in further trusts for the benefit of his two granddaughters. Irene post-deceased on May 13, 1990. Ms. Lefkowitz was named the sole executor under a codicil. After Ms. Lefkowitz was removed, The Bank of New York (BNY) succeeded as the executor and trustee of decedent's estate. BNY was also appointed the executor of Irene's estate.

BNY filed objections to Ms. Lefkowitz's account in both its fiduciary capacities. The other beneficiaries have also appeared by counsel. Although the beneficiaries have not filed objections to the account, their attorneys seek compensation from the estate for services rendered in the removal proceeding. In that regard, Ms. Lefkowitz seeks to apply the *pro tanto* rule, which provides that where an objectant is a person with less than 100 % interest in the estate, the return of any assets applies only

to the extent that the objecting party is damaged (*Matter of Garvin,* 256 NY 518; *Matter of Fuller,* 10 AD2d 938, *affd* 9 NY2d 943; *Matter of Zalzanick,* 90 Misc 2d 113), by requesting that any surcharge imposed be limited to Irene's share of the estate. However, the *pro tanto* rule is applicable only where all of the beneficiaries are necessary parties to the proceeding. Here, BNY as the successor executor, is the only necessary party to the preliminary executor's account (see, SCPA 2210 [4]). Thus, to the extent that BNY is successful in its objections the recovery shall inure to all persons interested in this estate.

Since decedent's death on March 15, 1988, this estate has been beset by litigation most of which stems from Ms. Lefkowitz's conduct. The record reveals that her involvement and control over decedent's assets began in May, 1985 after he suffered a paralyzing stroke. Thus, by the time Ms. Lefkowitz was appointed as preliminary executor, she was fully familiar with the composition of the estate, which consisted of various business interests and bank accounts in New York, Hong Kong and Switzerland.

The primary objection involves Ms. Lefkowitz's mismanagement of decedent's closely held business, Joseph Markovits, Inc. (JMI), a wholesale artificial flower company. By prior decision, Ms. Lefkowitz was removed for improvidence in transferring estate assets to the family businesses, self dealing in her attempt to acquire the proceeds of certain assets in Hong Kong and for her willful refusal to obey court orders (Matter of Marsh, supra). The issue of whether a surcharge was warranted was to abide her accounting. After a protracted hearing on Ms. Lefkowitz's accounting, the referee has reported to the court and recommends sustaining many of BNY's objections as well as imposing a substantial surcharge for her flagrant

mismanagement of this estate. The objections by BNY, requests for fees by the beneficiaries counsel and recommendations of the referee are determined as follows:

With respect to Schedule A, assets collected, Ms. Lefkowitz failed to establish the value of decedent's personal property, which is her burden (see, *Matter of Warhol,* NYLJ, April 4, 1994, at 29, col 5). BNY's objection to the value stated in the account is sustained in accordance with the referee's report.

The objection raised to Ms. Lefkowitz's treatment of Marsh Oil Co., which leased oil and gas wells, is sustained to the extent of the referee's report. The record establishes that Ms. Lefkowitz failed to act promptly in having this asset appraised. Has she done so, she would have learned that the asset was worthless and any expenses paid would simply result in a loss to the estate. Accordingly, Ms. Lefkowitz is surcharged in accordance with the referee's report for the expenses paid to Davies & Co. after decedent's death in the amount of $13,096.32. Additionally, Marsh Oil Co. shall be identified on Schedule A at $48,644.

BNY objects to Ms. Lefkowitz's failure to include as an estate asset, $500,000 she received as a gift from decedent, which violated an agreement he had with his post-deceased wife. The agreement provides that "neither will revoke his or her Will, disposing of his or her property at death, without the consent of the other." The evidence clearly proves that the $ 500,000 transfer was a gift from decedent to Ms. Lefkowitz. However, the parties were at liberty to dispose of their property during their lifetimes, "short of making a different testamentary disposition or a gift to defeat the purpose of the agreement" (*Rastetter v.*

Hoenninger, 214 NY 66; *see also, Schwartz v. Horn,* 31 NY2d 275; *Matter of Schuman,* NYLJ, October 15, 1992, at 29, col 3). Here, while the amount of the gift is substantial it forms only a nominal part of decedent's gross estate which is in excess of $ 15.5 million. Accordingly, the referee's recommendation to deny the inclusion of the amount of the gift as an estate asset is confirmed.

With respect to administration expenses, Ms. Lefkowitz failed to justify expenses she purportedly paid in the amount of $2,563.63 for which amount she is surcharged (*Matter of Shulsky,* 34 AD2d 545, app den 27 NY2d 743) or establish the right to reimbursement for legal fees paid to attorneys in New York and Hong Kong (*see, Matter of O'Donnell,* 28 Misc 2d 1040; *Matter of Puma,* NYLJ, October 27, 1989, at 30, col 5). None of the legal services appear to have been rendered for the benefit of the estate. It is noted that during this period, Ms. Lefkowitz disregarded this court's repeated direction that she commence proceedings in Hong Kong for the appointment of an ancillary fiduciary (*see, Matter of Marsh,* supra). Moreover, legal fees incurred by a fiduciary in unsuccessfully defending oneself against surcharge may not be paid from the estate (*Matter of Hildreth,* 274 App Div 611, *aff'd* 301 NY 705; *Matter of Chiesa,* 23 AD2d 562). Accordingly, the recommendation of the referee is confirmed with respect to denial of her request for reimbursement of $30,532.74 paid to various attorneys and $4,164.08 paid to Graham & Young. The fees sought by the firms of Kaye, Scholar, Fierman, Hayes & Handler and Schulte, Roth & Zabel are allowed in the amounts requested. The proof establishes that the services rendered by each firm were for the benefit of the estate. (*Matter of Potts,* 213 App Div 59, *aff'd* 241 NY 593; *Matter of Freeman,* 34 NY2d 1). The balance of the administration expenses incurred by Ms. Lefkowitz, in the sum of $27,532.74 are allowed.

Ms. Lefkowitz seeks to be paid personally for her services rendered to the family businesses, JMI and Floral Masquerade, Inc. (Floral) in the amount of $1,295.860. This imaginative request is wholly unsupported.

BNY demonstrated that Ms. Lefkowitz never received compensation in amounts near those she seeks in this accounting. Her salary for mid 1986 through 1987 was $150,000. While the corporate resolutions provide that the officers may pay the Chief Operating Officer a bonus, no such bonuses were paid during decedent's lifetime.

The evidence establishes that Ms. Lefkowitz grossly mismanaged the decedent's business interests. During Ms. Lefkowitz's tenure, JMI suffered losses of approximately $6 million. JMI had its best year in 1984 with gross sales of $24 million and profits of $850,000. In 1988 sales decreased to $17.2 million and operating losses totaled $ 2.1 million. In 1988, an auditor, Ernst & Young, questioned the ability of JMI to continue as a going concern. Floral, which was incorporated in 1987, had a limited function only after decedent died. Thus, the performance of these corporations does not establish the right to any compensation, let alone a bonus of over a million dollars. Accordingly, her request for compensation for services to the corporations is denied.

The other beneficiaries appeared by counsel who seek fees related to services rendered in the removal proceeding. Claudia Applebaum appeared by Greene & Zinner who seeks $257,000 and Loretta and Laura Fine by Shea & Gould who seeks $267,000. The referee recommends denial of these fees from estate assets because the attorneys' services did not benefit the estate. Although both firms appeared and participated in the

removal proceedings, BNY's counsel took the lead role in successfully obtaining Ms. Lefkowitz's removal. Thus, the services of the attorneys for the beneficiaries were duplicative and did not enhance the estate and are accordingly denied without prejudice to recovery from their clients.

The court, however, is mindful of the impact the payment of the substantial fees charged by BNY's counsel, as well as their own counsel, will have upon the beneficiaries, through no fault of their own. Such fees were incurred solely as a result of the need to redress Ms. Lefkowitz's improvident conduct. It would be inequitable to now make the other beneficiaries bear the entire expense.

Despite the general rule that a party to a lawsuit cannot require his adversary to pay his legal expenses (*Matter of A. G. Ship Maintenance Corp. v. Lezak,* 69 NY2d 1), an errant fiduciary may be surcharged for the legal expenses incurred in establishing his wrongdoing and obtaining recoupment (Matter *of Garvin,* 256 NY 518; *Matter of Hidden,* 243 NY 499, motion denied 244 NY 563; *Parker v. Rogerson,* 49 AD2d 689; Matter *of Miller,* NYLJ, August 30, 1995, at 25, col 5). Ms. Lefkowitz's conduct which precipitated the removal proceeding is such a case. Accordingly, the legal fees incurred by counsel to BNY in the removal proceeding shall be charged directly against Ms. Lefkowitz's share of the estate. The amount of such fees shall abide the final determination of the fees to be paid BNY's attorneys. This ruling is without prejudice to BNY's application to have additional fees of its attorneys paid from Ms. Lefkowitz's share in the estate.

Finally, on the issue of expenses, the fee of Robert Swetnick, Esq. is allowed in the sum of $6,500.

We turn now to the requests for surcharge.

The Hong Kong Inland Revenue Department (akin to the Internal Revenue Department) imposed a penalty of HK 200,000 for certain delays in filing an Estate Duty Affidavit (in which the estate assets are identified) and a corrective affidavit. During the period Ms. Lefkowitz acted as preliminary executor she never made any effort to have an ancillary fiduciary appointed in Hong Kong. As noted, she was admonished by this court for such failure. In fact, one of the grounds for Ms. Lefkowitz's removal was her self dealing in seeking to acquire the proceeds of a pension fund in Hong Kong. It appears that her failure to arrange for a fiduciary in Hong Kong was deliberate. The Estate Duty Affidavit was required to be filed within a year of decedent's death. Thus, Ms. Lefkowitz is responsible for the penalty imposed on such delay. However, there is no explicit finding by the Hong Kong Inland Revenue Department that the entire penalty was imposed as a result of her delay. Rather, the proof indicates that a portion of the penalty may be the result of the delay by the ancillary administrator, appointed after BNY began acting as executor, in filing a corrective affidavit. Notwithstanding the finding of the Hong Kong authorities, the referee recommends surcharging Ms. Lefkowitz for the entire penalty. The court disagrees. Ms. Lefkowitz is surcharged for one-half of the penalty, with interest.

The primary objection pertains to loans Ms. Lefkowitz made to JMI. Within three months of decedent's death, she transferred $1,500,000 of estate assets to two non-operating corporations which were wholly owned by decedent, Floral and

NVM Capital Corp. (NVM). There is not a scintilla of evidence that the transfers to Floral and NVM were of any benefit to the estate. At the time of the transfers to Floral and NVM, the estate had just $1.9 million in liquid assets. [1]Such transfers have already been determined to be improvident (*Matter of Marsh, supra*).

In 1989 Ms. Lefkowitz transferred to JMI $1,050,000 from NVM and $250,000 from Floral. While NVM and Floral were wholly owned by decedent, he only held a 50 % interest in JMI. Irene owned the other half of JMI. Thus, the immediate effect of these transfers was to diminish the value of the estate assets. JMI never repaid either loan. Clearly, these transfers, made to a corporation which was spirally downward, were highly imprudent and placed the estate assets at extreme risk. Essentially, Ms. Lefkowitz gambled with the estate assets.

Negligence is defined as the failure to use such care as a reasonably prudent person would use under such circumstance (*Matter of Donner,* 82 NY2d 574; *Matter of Acker,* 128 AD2d 867; *Matter of Lippner,* 135 Misc 2d 34). Ms. Lefkowitz's actions, which commenced after her father's stroke, set in motion the precipitous decline of JMI. She then risked estate assets by moving them first to non-functioning corporations and then to JMI in order to continue a failing corporation, all without regard to the effect such transactions would have upon the estate. Such actions constitute gross negligence (*see, Matter of Etoll,* 101 AD2d 935).

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[1] In affirming this court's removal of Ms. Lefkowitz, the Appellate Division noted that the transfers created a liquidity crisis for the estate, the consequence of which substantially harmed decedent's wife who was seriously ill and in dire need of funds.

JMI was ultimately sold for $ 2.1 million of which decedent's estate received $1,812,650.53. BNY has established that 14 percent of the sales price is allocable to the loans from Floral and NVM. Accordingly, the referee's recommendation that Ms. Lefkowitz be surcharged in the amount $ 1,214,000 (the amount of the unpaid loans less their interest in JMI), plus interest from October 6, 1989, is confirmed.

Based upon the uncontroverted loss to the estate caused by the preliminary executor's actions, mismanagement of assets and self serving applications she is surcharged in accordance with the above directives. Finally, where a fiduciary's mismanagement of an estate is so flagrant, denial of commissions in addition to surcharge is warranted (*Matter of Pati,* 151 AD2d 1006; *Matter of Acker,* 128 AD2d 867; *Matter of Seabury,* NYLJ, May 17, 1995, at 28; *Matter of May,* NYLJ, March 8,1994, at 31, col 2, *Matter of Puma,* NYLJ, October 27, 1989, at 30, col 5). This is such a case. Ms. Lefkowitz has ignored her fiduciary responsibility and exhibited a total disregard for the interests of the beneficiaries of this estate. Accordingly, she is denied commissions.

The referee's report is confirmed in all other respects.

Settle decree.

S/ EP
Surrogate's

Dated: July 29, 1997

New York Law Journal
February 1, 1994, Tuesday

SECTION: COURT DECISIONS; NEW YORK COUNTY; SURROGATE'S COURT: Pg. 23

Surrogate Preminger

Estate of NICHOLAS MARSH, a/k/a Nicholas V. Marsh, dec'd The pending contested accounting of the former preliminary executor and applications for legal fees are referred to David Rudenstine, Esq. For trial (SCPA 506) which shall commenced [sic] on Thursday, March 3, 1994 at 10 A.M. and continue on March 4, 1994. A pretrial conference is scheduled for Friday, February 18, 1994 at 11 A.M. in room 614.

The referee shall be entitled to receive a fee based upon his usual hourly rate together with reasonable expenses (SCPA 506 (5)) which shall be determined upon the conclusion of the hearing and after a review of his affidavit.

Note: The official version of this decision could not be located at Surrogate's Court.

Surrogate's Court: New York County

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In the Matter of the Accounting of the Bank of New York, as Executor of the Estate of

NICHOLAS MARSH, a/k/a NICHOLAS V. MARSH,

Deceased.

File No: 1980/88

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In the Matter of the Application of Adrienne Marsh Lefkowitz to Revoke the Letters Testamentary Issued to the Bank of New York, as Preliminary Executor of the Estate of

NICHOLAS V. MARSH,

Deceased.

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Accounting of Stuart Salles as Temporary Administrator of the Estate of

NICHOLAS V. MARSH,

Deceased.

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Preminger, S.

This application to vacate the appointment of a referee and for recusal is denied in accordance with the Court's decision on the record following oral argument on May 9, 1997.

This memorandum, together with the transcript of the May 9, 1997 proceedings, shall constitute the order of the Court.

S/
Surrogate

Dated: May 16, 1987

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of June 2000

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

1-10 Mo. No. 474
In the Matter of Nicholas Marsh,etc.,
Deceased.

Accounting of Adrienne Marsh Lefkowitz, etc.,

In the Matter of Shea & Gould, etc.,

In the Matter of Greene & Zinner, P.C. & etc.

Adrienne Marsha [sic] Lefkowitz,
Appellant,
Claudia M. Appelbaum, et al.,
Respondents,
The Bank of New York, etc.,
Objectant-Respondent,
Schulte, Roth & Zabel, et al.,
Fee Petitioners-Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

CONSTITUTION OF THE UNITED STATES

AMENDMENT I-FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor` shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

*** THIS SECTION IS CURRENT THROUGH CH. 609, 01/28/2001 ***

SURROGATE'S COURT PROCEDURE ACT
ARTICLE 5. TRIALS AND HEARINGS

NY CLS SCPA @ 506 (2000)

@ 506. Reference to hear and report

1. In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report.

2. No referee to examine an account rendered or to report questions arising upon the settlement of the account shall be appointed where the estate does not exceed $1,000 in value or in any case where the item or items in such account to which objections have been made do not aggregate more than $200, except that in any such proceeding the court may appoint a referee to serve without compensation.

3. A referee shall have the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. The referee shall file his report within 30 days after the matter has been finally submitted. Unless otherwise stipulated a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report.

4. Upon the motion of any party or on its own initiative the court may confirm or reject in whole or in part the report of the referee; may make new findings with or without taking additional testimony or may order a new reference. Any party to the proceeding may serve notice of the filing of the report. Unless the motion be made within 60 days after service of notice of the filing of the report, it shall be deemed confirmed. Where no issues remain to be tried the court shall file its decision in writing.

5. The compensation and expenses of such a referee shall be fixed and allowed as provided by CPLR 8003(a) and 4321, except as limited by subdivision 2.

6. (a) Upon the consent of the attorneys for all parties who have appeared at the hearing, the court may designate the chief clerk, one of the other clerks, a [fig 1] court attorney or any assistant to take the testimony in any proceeding other than one where a right to trial by jury exists and to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report shall be in writing and shall be filed. It shall state the facts deemed to be essential, but need not make findings of fact. No exceptions need be filed to the report. The person so designated must be an attorney at law and shall have all the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. A copy of the report shall be sent to the attorney for each party who appeared at the hearing together with a notice that the report shall be deemed confirmed as of course unless within ten days from the date of mailing the report any party shall file with the court, a notice of motion to modify or overrule the report. Upon motion of any party or upon its own initiative the court may confirm, modify or reject the report in whole or in part, may make new findings with or without taking additional testimony or may order

a new hearing.

(b) It shall not be necessary to file a transcript of the testimony with such report but on a motion to modify or overrule the report any party may file a copy of the transcript.

(c) (Added, L 1993) Upon the consent of the attorneys for all parties who have appeared at the hearing, the necessity of the preparation of the report by the person so designated may be waived and the matter decided by the court based upon the transcript of the hearing. In such event the expense of the transcript shall be a charge against the estate, or where appropriate, as otherwise directed by the court.

(d) The person so designated as referee shall not receive any compensation from the estate or from any party for his services and shall be reimbursed for his necessary expenses only as provided in 2609 (3) (a).

HISTORY: Add L 1966, ch 953, eff Sept 1, 1967.

Sub 4, amd, L 1968, ch 259, @ 7, eff May 14, 1968.

Sub 6, add, L 1971, ch 361, eff Sept 1, 1971.

Sub 6, par (a), formerly sub 6, first undesignated par, so designated and amd, L 1993, ch 514, @ 9, eff Jan 1, 1994.

The 1993 act deleted at fig 1 "law assistant"

Sub 6, par (b), formerly sub 6, second undesignated par, so designated, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, par (c), add, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, par (d), formerly sub 6, third undesignated par, so designated, L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, first undesignated par, redesignated sub 6, par (a), L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, second undesignated par, redesignated sub 6, par (b), L 1993, ch 514, @ 9, eff Jan 1, 1994.

Sub 6, third undesignated par, amd, L 1985, ch 8, @ 1, eff March 19, 1985; redesignated sub 6, par (d), L 1993, ch 514, @ 9, eff Jan 1, 1994.

NOTES:

[1971] This act was recommended by the Surrogates' Association of the State of New York. Its purpose was to authorize the court, with the express consent of all attorneys for parties appearing at the hearing, to appoint a member of its staff who is an attorney at law, as a referee to hear and report in any proceeding other than one in which the right to a jury exists. The appointee performs this service at no expense to the estate or to the parties. The purpose of the act was to attempt to hold down the costs to estates, by eliminating the need to appoint and compensate persons who are outside the judicial system. Such reference could not be made without the consent of all attorneys who appeared at the hearing. The new procedure overcomes the criticism of section 2609, subdivision 3(a), in that it provides for all counsel to be furnished with a copy of the report and an opportunity to move with respect to it. The procedure under 2609 provides only for a report to the court which need not be furnished to counsel.

Earlier statutes: SCA @@ 66, 74; CCP @@ 2536; 2546.

REVISERS' NOTES:

The section changes Surr Ct Act @ 66 insofar as a referee is not required to report the facts found or the conclusions of law and it further denies any party the right to request the making of such a finding or conclusion. The section has been conformed to CPLR 4320(b) to require the referee to set forth his findings of fact and conclusions of law. The last two sentences of Surr Ct Act @ 74 are embraced within subdivision 1.

Surr Ct Act @ 66. Special provision has been made for appointment of a referee where the amounts are less than the statutory amounts, provided the referee serves without compensation. This accords with present practice.

The third subdivision of the proposed section follows CPLR 4320(a) and (b).

No provision for the appointment of official referees to determine any and all questions of law and the fact arising or specific issues in any proceeding other than one instituted for probate of a will, as found in the second paragraph of present Surr Ct Act @ 66, has been made, since such practice no longer exists.

No reference may be had in probate proceedings or where there is a right to jury trial which has been demanded.

The third paragraph of present Surr Ct Act @ 66 appears superfluous. The fourth subdivision is modeled after CPLR 4403: the time to move has been extended to sixty days and the wording is in keeping with Surrogate's Court practice.

WHERE ISSUES WERE FIRST RAISED AND PRESERVED

The issues to be reviewed and the list of where the issues are preserved for review are:

a) Violation of petitioner's due process rights because petitioner was entitled to a hearing by a duly constituted judge of a court. A hearing conducted by a referee to hear and report instead of by a duly constituted judge of the court violated petitioner's due process rights because, *inter alia,* the determination was made by the judge who had not had an opportunity to weigh the credibility of the witnesses.

The issue is preserved for review at pages 61 to 69 of petitioner's brief to the First Department, pages 29 to 31 of her reply brief, as well as at A-4936[2] *et seq.* and A-5062 *et seq.* and A-4781, 4785, and in petitioner's submission to the Court of Appeals.

Petitioner objected both prior to and during her accounting hearing. See, e.g., A-3424 to 3429 and TR:5/17/94 p. 50 at A-573. Once the clandestine payment and 11 *ex parte* phone calls became known petitioner promptly made a motion. Moreover, until the entry of the 1998 decree there was no final order to appeal. Nor could petitioner refuse to participate in the hearing because of the risk of a default. See also Memorandum of Law

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[2] References to the Appendix submitted to the New York appellate courts are denoted as A- and contain the cites to the trial court record.

(not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19.

b) The unconstitutionality of SCPA §506 which was used to impose a privately paid attorney as a referee to conduct the hearing, without consent of the parties. Not only are the parties denied their property by the imposition of the referee fees, but they are denied access to a duly appointed judge. A referee appointed pursuant to SCPA §506 has far broader responsibilities than one appointed under CPLR §3104. SCPA §506 is also inconsistent with *Ploski v. Riverwoods Owners_Corp.*, 255 A.D.2d 24 (2d Dept. 1999) and CPLR §3104.

The issue is preserved for review at pp. 61 *et seq.* of Petitioner's Brief to the First Department, pp. 30-31 of her Reply Brief, as well as A-4936 *et seq.* and A-5062 *et seq.* as well as in Petitioner's submission to the Court of Appeals.

c) Violation of petitioner's due process rights related to defects in the referee's service because *inter alia* the reference was made *sua sponte* and was objected to by petitioner; the referee was paid by petitioner's adversary prior to the issuance of the report; there were at least 11 *ex parte* conferences with opposing counsel; an undisclosed out-of-court relationship with a party; failure to swear an oath, failure to comply with CPLR §4315, 4312(3), 4321(1); and lack of expertise in the field. *Cf. Ploski v. Riverwoods Owners Corp.*, 255 A.D.2d 24 (2d Dept. 1999);

The issue is preserved for review at pp. 61 to 69 of petitioner's brief to the First Department, pp. 29-31 of her reply

brief, as well as A-4936 *et seq.* and A-5062 *et seq* and A-4781, 4785. See also Memorandum of Law to trial court (not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19. See also petitioner's submission to the Court of Appeals.

d) Violation of petitioner's due process rights related to material misrepresentations made by the referee which denied petitioner a fair hearing. Material misrepresentations of the referee that denied petitioner due process and a fair hearing, include *inter alia:*

1) on June 15, 1994 the Referee made a ruling that "Ms. Lefkowitz has presented adequate evidence with regard to the valuations of Floral Masquerade and NVM Capital as of January 31, 1990 to shift the burden to the Bank ...." (TR: 6/15/94 p. 216 at A-1151). This ruling disrupted Petitioner from calling witnesses and the organization of her case. Nor was she later permitted to introduce more valuation evidence.

2) Assuring Petitioner at a pre-hearing conference that she could have a live court reporter transcribe the hearing at her expense (TR: 5/13 p. 8 at A-550). Early in the hearing the Referee ruled there could be no transcription by the live reporter, even if each page were stamped

"not official copy" and would not be used in court without permission (TR: 5/17 p. 34 at A-569). (See p. 65 of June 1999 brief.)

3) That Petitioner should not contest the Greene testimony of benefit to the company until later (A-508). This opportunity was never given. Yet part of the $176,000 allocated for Greene & Zinner fees related to the company.

4) That only Greene & Zinner and Shea & Gould fees related to the 1990 removal trial would be considered (TR: 5/12/94 pp. 24 *et seq.* at A-477 to A-480). Yet the amounts allocated to them far exceeded the amounts they claimed for the 1990 removal trial. The amount sought for the 1990 removal trial for Greene & Zinner was $50,000 (A-166) and for Shea & Gould was $47,000 (A-167).

5) The Referee never permitted Petitioner to value Joseph Markovits, Inc. ("JMI") as of January 31, 1990. (TR: 5/25/94 pp. 240-44 at A-703-04 and A-4742.) This information was essential to the issue of JMI's ability to repay its loans from the estate companies.

The issue is preserved for review at pp. 61 to 69 of Petitioner's Brief to the First Department, pp. 29-31 of her Reply

Brief, as well as A-4936 *et seq.* and A-5062 *et seq* and A-4781, 4785. See also Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated March 29, 1996 at pp. 185-188, 207-217 and Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 13 to 19. It is also addressed in petitioner's submission to the Court of Appeals.

e) Violation of petitioner's due process rights in the award of $250,000 (plus interest) from petitioner's share of the estate for other beneficiaries' attorney fees because petitioner was not given notice or a hearing. In particular the 1994 hearing and the attorney fee petitions of Greene & Zinner and Shea & Gould had sought payment from the estate. In fact the February 1998 decision was contrary to the referee's factual findings and relied solely on motions to reconsider. Moreover, the decision conflicts with this court's decisions in *Matter of Dillon,* 28 N.Y.2d 597 (1971) and *Northam v. Dutchess Cty. Mut. Ins. Co.,* 177 N.Y. 73 (1903), and the Third Department's decision in *Matter of Urbach,* 252 A.D.2d 318 (3d Dept. 1999) and the Fourth Department's decision in *Estate of Bellinger,* 56 A.D.2d 448, 451 (4th Dept. 1977), as well as numerous other decisions;

The issue is preserved for review at pp. 14 to 18 of petitioner's brief to the First Department and p. 34 of the reply brief, and at A-2857 to 3458 and A-3474 to 3501. Because the 1998 decision was in response to motions to reconsider (which did not disclose petitioner's exposure even in the notices of motion, at A-3462-63 and A-2816-17), decided almost 4 years after the 1994 hearing, the due process issues could not have been argued at the hearing or before petitioner knew Greene & Zinner and Shea & Gould sought to change the relief sought and that her property was at risk. Nevertheless, her "due process" arguments

below are found at A-3475 and A-3477. See also Memorandum of Law (not in appendix but subpoenaed to Appellate Division) dated September 6, 1996 at pp. 163 to 197. The issue is also addressed in petitioner's submission to the Court of Appeals.

It is unconstitutional for a court to rule in a matter over which it lacks subject matter jurisdiction. Subject matter jurisdiction goes to the court's power. The issue of subject matter jurisdiction may not be waived or "conferred" by consent. Moreover, it can be raised at any time.

Moreover, in ¶47 of her August 31, 1996 affidavit at A-4800, Petitioner stated she "preserves all issues for appeal including but not limited to the denial of her constitutional right to a fair hearing and to due process and equal protection of the law ..."

LIST OF DOCUMENTS SUBMITTED TO
NEW YORK COURT OF APPEALS

Copies of the following were filed with the New York Court of Appeals in October 2000:

October 27, 2000 Statement of Subject Matter Jurisdiction for Appeal as of Right to the Court of Appeals on Basis of Constitutional Question;

October 16, 2000 Jurisdictional Statement Pursuant to Rule 500.2 for Appeal as of Right to the Court of Appeals;

October 16, 2000 Notice to Attorney General and certification of service;

October 6, 2000 Notice of Appeal;

October 26, 1999 order of the Appellate Division, First Department with notice of entry served on November 4, 1999;

February 8, 2000 order of the Appellate Division, First Department with notice of entry served on March 16, 2000;

July 15, 1999 order of the Appellate Division, First Department with notice of entry served on August 20, 1999;

June 13, 2000 order of the Court of Appeals with notice of entry served on September 5,

2000;

The decree dated April 23, 1998 with entry on April 27, 1998;

The February 6, 1998 decision of the Surrogate's Court,

The July 29, 1997 decision of the Surrogate's Court,

May 16, 1997 decision of the Surrogate's Court also within Exhibit E of April 11, 2000 motion;

February 1, 1994 order appointing the Referee;

The Referee's Report dated December 1, 1995.

Copies of the following were previously filed with the New York Court of Appeals on April 11, 2000:

Motion for leave to appeal;

Appellant's Brief to the First Department;

Appellant's Reply to the First Department;

Appellant's 5,172 page Appendix to the First Department;

3 Respondents' Briefs to the First Department;

Notice of Appeal served on May 26, 1998;

April 1, 1999 order of First Department granting Appellant's motion to enlarge the time to perfect the appeal within Exhibit D of April 11, 2000 motion;

March 16, 1999 order of Surrogate's Court settling the transcript within Exhibit E of April 11, 2000 motion.

(7)

No. 00-1462

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

—v.—

THE BANK OF NEW YORK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
PETITIONER HAS NOT PROPERLY RAISED ANY SUBSTANTIAL FEDERAL QUESTIONS	2
THERE ARE NO CONSTITUTIONAL DEFECTS IN SCPA § 506 OR WITH THE APPOINTMENT OR PERFORMANCE OF THE REFEREE	4
PETITIONER'S DUE PROCESS CLAIMS LACK MERIT	10
THE SURCHARGES IMPOSED BY THE SURROGATE WERE LEGALLY AND CONSTITUTIONALLY APPROPRIATE	15
CONCLUSION	25

TABLE OF AUTHORITIES

Cases: PAGE

Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)..... 5

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 2d 113 (1971)..... 10, 11

Estate of Bellinger, 55 A.D.2d 448, 390 N.Y.S.2d 739 (Fourth Dept., 1977) 22, 23

Estate of Burns, 130 Misc.2d 317, 496 N.Y.S.2d 921 (Surrogate's Court, Broome County, 1985); *affirmed* 126 A.D.2d 809, 510 N.Y.S.2d 732 (Third Dept., 1987) 20, 21

Estate of Heilbronner, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr. Ct. N.Y. Co. 1963)..... 24

Gerzof v. Gulotta, 87 Misc.2d 768, 386 N.Y.S.2d 790 (Sup. Ct. Nassau Co. 1976).....12, 13, 14

Hebard v. City of New York, 137 A.D. 752, 122 N.Y.S. 628 (1st Dept. 1910)..... 7

In re Gerzof, 45 A.D.2d 450, 359 N.Y.S.2d 76 (2nd Dept. 1974) 12

Matter of Dillon, 28 N.Y.2d 597, 319 N.Y.S.2d 850 (1971)..... 18

Matter of Estate of Campbell, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3rd Dept. 1988) 17

PAGE

Matter of Gerzof, motion for leave to appeal denied, 35 N.Y.2d 644, 362 N.Y.S.2d 1026 (1974), *motion to dismiss appeal granted*, 35 N.Y.2d 855, 363 N.Y.S.2d 1027 (1974), *motion for stay denied*, 35 N.Y.2d 856 (1974) 12

Matter of Graves, 197 Misc. 638, 95 N.Y.S.2d 310 (Surr. Ct. Monroe Co. 1950)..... 22

Matter of Urbach, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3rd Dept. 1999) 18

Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) 11

McGraw-Edison Co. v. Central Transformer Corp., 308 F.2d 70 (8th Cir. 1962)..... 5

Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975), *affirmed sub nom. Gerzof v. Gulotta*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976)..... 12

M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) 11

National Bank of North America v. New Paltz Growers, Inc., 89 A.D.2d 647, 453 N.Y.S.2d 124 (3rd Dept. 1982) 8

Ploski v. Riverwood Owners Corp., 255 A.D.2d 24, 688 N.Y.S.2d 627 (2nd Dept. 1999)..... 6

Robinson v. Ball, 187 A.D. 799, 176 N.Y.S. 273 (1st Dept. 1919) 7

United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973) 11

PAGE

Statutes and Rules:

CPLR § 3104(b) 6

CPLR § 4212 ..... 4, 5

CPLR § 4317(b) 5

CPLR § 5501 2

Federal Rules of Civil Procedure, Rule 53 5

Judiciary Law § 290-a 9

McKinney's 2001 New York Rules of Court § 100.3(B)(6)(a); 22 NYCRR § 100.3(B)(6)(a) 8

Rules of the Supreme Court of the United States, Rule 14(g)(i) 3

SCPA § 506 ..... 4, 5

SCPA § 2110 ..... 16, 18, 19

Other Authorities:

Siegel, D., *New York Practice*, 2d Ed. § 530, p. 831 ..... 2, 3

PRELIMINARY STATEMENT

In a proceeding to examine an accounting submitted by the Petitioner with respect to her actions as preliminary executor of her father's estate prior to her removal for gross mismanagement of estate assets, self dealing and willful refusal to obey court orders, the Surrogate appointed a referee to hear and report on the factual issues. After reviewing the report of the referee, the Surrogate surcharged the Petitioner for various items and ordered that certain attorney's fees incurred by other beneficiaries of the estate be paid out of the Petitioner's share of the estate. The Surrogate stated that this was appropriate since the services of such attorneys enhanced the estate and brought about the removal of the Petitioner, and were necessitated by the Petitioner's breach of her fiduciary duties. Having exhausted her appeals in the state courts, Petitioner now seeks a Writ of Certiorari in the United States Supreme Court. Her Petition should be denied for the reasons set forth below.

Petitioner failed to raise any federal questions in the court of first instance. For this reason, these issues were not properly preserved for review by the state appellate courts or by this Court. Moreover, even if the issues had been properly preserved, they do not present substantial federal questions.

The Petitioner's insistence that a referee cannot constitutionally be appointed to report to the court on complicated questions of fact unless all parties consent is based upon the legislative history of a statutory section other than the one actually relied upon by the Surrogate in appointing the referee, and is contrary to applicable case law. Her allegation that the referee was improperly paid ignores the fact that the interim fee was fixed by the Surrogate after a motion made on notice to all parties, including the Petitioner, was not opposed. The assertion

that the Petitioner was denied the right to have her own private stenographer transcribe the proceedings is not relevant because she does not allege that she was prejudiced by the mechanical system used. (Petitioner also alleges that the use of the mechanical system was contrary to law, based upon a statute that was not enacted until after the hearing in this matter had been concluded.)

Finally, Petitioner's contention that the surcharges imposed by the Surrogate were not appropriate is contrary to the weight of authority. The litigation for which the surcharges were imposed was required solely because of her malfeasance, and the services of the attorneys for the other beneficiaries enhanced the estate and led to the removal of the Petitioner. Under those circumstances, it is only appropriate for the cost of the litigation to be borne by the Petitioner.

PETITIONER HAS NOT PROPERLY RAISED ANY SUBSTANTIAL FEDERAL QUESTIONS

The instant Petition is procedurally defective because it does not establish that the federal issues sought to be presented to this Honorable Court were timely and properly raised during the course of the state proceedings. To her credit, the Petitioner does not claim that any of the purported federal questions were specifically raised in the court of first instance, the Surrogate's Court for the County of New York. Instead, she asserts that they were all raised, for the first time, on appeal.[1] However, under New York Civil Practice Law and Rules ("CPLR") §5501, the scope of appellate review in state courts is generally limited to matters raised in the trial court. In his treatise, *New York Practice*, 2d Ed., §530, p.831, Professor Siegel states that:

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[1] Petition, pp. 52a-57a.

> "There is a broad and general rule that the court will not review on appeal any points not raised in the court below, and this is a salutary provision designed to avoid waste. Its principal rationale is that if the matter had been duly raised below, it might have prevailed there and an appeal been spared." (Footnote omitted)

Since the issues which Petitioner seeks to raise here were not properly raised in nisi prius, they were not properly preserved for review by the appellate courts of New York, and hence may not appropriately be asserted before this Court.

Even if the issues had been preserved for consideration by this Court, they certainly would not present federal questions important enough to provide a compelling reason to grant a writ of certiorari. Moreover, Rule 14(g)(i) of the Rules of the Supreme Court of the United States requires that the Petition for Writ of Certiorari include specific information as to the method and manner of raising the federal questions and the way in which they were passed on by the courts below, with "pertinent quotations of specific portions of the record or summary thereof . . . so as to show that the federal question was timely and properly raised. . . ." Here, Petitioner has furnished no quotations from any part of the record, and many of the Petitioner's references to the Appendix filed in the appellate courts of New York appear to have nothing whatever to do with the points for which they are cited as support. Indeed, Petitioner has assiduously avoided providing any of the specific information called for in the Rules, apparently because it would reveal that there is no proper basis for the Petition.

THERE ARE NO CONSTITUTIONAL DEFECTS IN SCPA §506 OR WITH THE APPOINTMENT OR PERFORMANCE OF THE REFEREE

Here, the Petitioner has attempted to distort the record by re-casting uncompelling state issues into federal questions worthy of review by certiorari. The attempt should be rejected. For example, Petitioner questions the constitutionality of New York Surrogate's Court Procedure Act ("SCPA") §506, either as written or as applied, pointing to the legislative history as justification for her assertion that the appointment of a referee without the consent of all litigants is contrary to the provisions of the statute.

In fact, the legislative history to which Petitioner refers applies only to subsection 506(6), which was added in 1971 to allow the Surrogate to appoint court personnel as referees to take testimony and report to the court under certain specific circumstances. This subsection requires that all attorneys consent to the designation. The appointment of Professor Rudenstine as Referee to hear and report in this case was not made pursuant to SCPA §506(6), but rather pursuant to SCPA § 506(1), which does not require consent of the parties to a reference and permits appointment of a referee by the Surrogate *sua sponte*. Accordingly, all of Petitioner's arguments based upon the provisions of SCPA § 506(6) and its legislative history are totally irrelevant to a court appointment pursuant to SCPA § 506(1).

At page 13 of her Petition, Petitioner also insists that the State of New York does not allow privately paid referees to be appointed without consent in its other courts. This is demonstrably untrue. CPLR Rule 4212 provides, in pertinent part, as follows:

> "Upon the motion of any party as provided in rule 4015 *or on its own initiative*, the court may submit

> any issue of fact required to be decided by the court to an advisory jury or upon a showing of some exceptional condition requiring it *or in matters of account, to a referee to report.*" (Emphasis added.)

Indeed, CPLR § 4317(b) even allows a court, without consent of the parties and on its own motion, to appoint a referee to *determine* a cause of action or an issue requiring the examination of a long account.

Nor is the New York statutory scheme concerning the appointment of referees a recent or unusual one. The use of referees in matters involving lengthy testimony concerning complex factual situations is a traditional method of maximizing judicial resources while protecting the rights of litigants. The precursors to the present New York statutes on this subject were enacted more than 150 years ago, and the current laws were, in part, patterned after Rule 53 of the Federal Rules of Civil Procedure.[2] These provisions codify the inherent power of a court to appoint qualified attorneys to assist it in the accomplishment of its duties. Where, as here, the appointment of a referee is for the purpose of hearing and reporting the findings of the referee on the required matters, rather than hearing and determining them, the ultimate decision is reserved for the court, and the referee's role is a subsidiary one. SCPA § 506(4), applicable here, specifies that the court may confirm or reject in whole or in part the report of the referee. In fact, the Surrogate did not

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[2] In *McGraw-Edison Co. v. Central Transformer Corp.*, 308 F. 2d 70 (8th Cir. 1962), a litigant asserted denial of due process arising out of the use of a special master pursuant to Rule 53(a). The court held that the unnecessary appointment of a special master may amount to a denial of due process, but quoted from *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942) for the proposition that an appraisal of the totality of facts in a given case is the appropriate test of whether due process has been denied. The court held that there had been no denial of due process.

accept some of the findings of the referee, thus proving that she had properly exercised her discretion in evaluating the report.

The sole case cited by Petitioner as authority for her contention that New York does not permit judges to appoint private attorneys as referees without the consent of all parties, *Ploski v. Riverwood Owners Corp.*, 255 A.D.2d 24, 688 N.Y.S.2d 627 (2nd Dept. 1999), made no such broad statement of prohibition. It dealt only with the appointment of referees to supervise disclosure pursuant to CPLR §3104(b), and held that the statutory language specifically required that the parties stipulate to the name of a private attorney to act as referee to supervise disclosure. The statute involved in the *Ploski* case has no effect on the ability of judges to appoint private attorneys as referees in other contexts, pursuant to other statutes or their inherent powers.

Petitioner's allegations concerning the purportedly "clandestine" payment of fees to the Referee by The Bank of New York are similarly unfounded. In fact, there was nothing clandestine about it. After devoting nearly 500 hours to this matter over a period of months, the Referee applied to the Surrogate, *on notice to all parties, including Petitioner*, for an award of interim fees.[3] The motion was unopposed, and by an Order dated June 19, 1995, the Surrogate awarded interim fees in an amount somewhat lower than that requested, again properly exercising her discretion.

The Bank of New York, as successor Executor, arranged to pay the interim fee awarded by the Surrogate. Petitioner complains that this payment was improper because it came before the referee's report was submitted. How-

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[3] Although Petitioner conveniently failed to disclose this detail, the motion is reproduced in the Appendix submitted to the New York appellate courts at A4760-A4778.

ever, if the interim fee was not to be paid until after the completion of the report, there would have been no point whatsoever to an award of interim fees. No one disputed that the Referee had performed the work described in his motion, but Petitioner now insists that he should have been made to wait a further period of time, the duration of which could not then be determined, before payment of the interim fee already awarded by the court could be made.

The cases cited by Petitioner decrying the payment of fees to referees prior to the issuance of the report are all inapposite, because they concern referees soliciting and accepting payments which the courts had not approved. In the case most prominently relied upon by Petitioner, *Robinson v. Ball*, 187 A.D. 799, 176 N.Y.S. 273, 275 (1st Dept. 1919), the court stated that if the parties in that case had entered into a stipulation for interim payment of fees, such payment might have been proper. It is respectfully submitted that where the court itself grants an order fixing the amount of interim fees, upon an unopposed motion on notice, the propriety of the payment of such fees is not questionable. Moreover, the Petitioner's silence in failing to oppose the application for an interim award of referee's fees should be deemed as tacit consent to the application.

In an earlier case cited by the *Robinson* court and by Petitioner, *Hebard v. City of New York*, 137 A.D. 752, 122 N.Y.S. 628, 629 (1st Dept. 1910), the court stated that, ". . . *under ordinary circumstances* a referee's right to fees does not accrue until he has completed the reference and filed or delivered his report." (Emphasis added.) Where a protracted course of hearings and submission of written materials has already taken up nearly 500 hours of the referee's time, for which an interim fee award of over $100,000 is made by the court, and the

end of the process is not yet in sight, ordinary circumstances do not exist.

In another case cited by Petitioner, *National Bank of North America v. New Paltz Growers, Inc.*, 89 A.D. 2d 647, 453 N.Y.S. 2d 124 (3rd Dept. 1982), a referee was appointed in a mortgage foreclosure action. He advised both parties that he would bill them for his services at a rate higher than that permitted under the applicable statute. One party agreed, and the other party moved for the referee's removal. On appeal, the court removed the referee, holding that the moving party had been justified in questioning the impartiality of the referee under those circumstances. Here, on the other hand, there can be no such result, because the fee was not requested on an extrajudicial basis. Instead, it was requested of the court and fixed by the court, without opposition.

Petitioner also makes repeated references to *ex parte* conversations which allegedly took place between the referee and attorneys for some of the parties, insinuating that these purported contacts were wrongful and supported her request that the referee be removed. However, the Rules of the Chief Administrator of the Courts of New York specify that:

> "Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond."[4]

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[4] McKinney's 2001 New York Rules of Court §100.3(B)(6)(a); 22 NYCRR §100.3(B)(6)(a).

Petitioner has not alleged that any of the purported communications of which she complains failed to comply with these provisions. It may be assumed that a referee would be permitted at least as much latitude as a judge in the area of *ex parte* communications.

Petitioner insists that the use of a mechanical transcription system deprived her of important rights and violated New York law. However, the statute she claims was violated, Judiciary Law § 290-a, which limited the use of mechanical transcription systems to cases involving no more than two parties, was enacted after the hearings in this matter were concluded.[5] In addition, and even more importantly, Petitioner does not cite even one instance in which the use of a mechanical transcription system caused any prejudice to her. Certainly, she gives no indication of any such problem that could rise to a level cognizable as a deprivation of due process rights.

Since Petitioner has shown no prejudice from the use of the mechanical transcription system, it is clear that she has also failed to show any prejudice from the exclusion by the referee of the court stenographer that Petitioner wanted to prepare a transcript of the proceedings.

Petitioner insists that she has been deprived of property and her reputation "without . . . obtaining meaningful judicial review." (Petition, p. 20) It appears that Petitioner defines meaningful judicial review as judicial review that upholds her unique factual views and legal theories. In fact, this matter has received a thorough investigation and review by New York courts. The Surrogate's Court determined that Petitioner, as preliminary executor, had grossly mismanaged estate assets, improvidently transferred estate assets to non-operating family businesses, engaged in self dealing and willfully refused

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[5] This section took effect as of April 1, 1995, nearly three months after the hearings in this case were concluded.

to obey court orders. Because of these actions, the court removed her as preliminary executor. The court further found that the Petitioner had ignored her fiduciary responsibilities and had exhibited a total disregard for the interests of the estate beneficiaries, and accordingly denied her commissions and imposed various surcharges, including the legal expenses incurred by the estate and beneficiaries in bringing about Petitioner's removal as preliminary executor. (Petition, pp. 26a to 38a) Through all of the succeeding motions and appeals, the findings and rulings of the Surrogate have been thoroughly reviewed and upheld.

PETITIONER'S DUE PROCESS CLAIMS LACK MERIT

The due process arguments made by Petitioner are based upon cases that are readily distinguishable from the instant situation. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), this Court held that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (401 U. S. at 377, 91 S. Ct. at 785) That case was a class action brought by welfare recipients to challenge state procedures for commencing litigation which required litigants to pay court fees and service of process fees which were conceded to be beyond the ability of the plaintiffs to pay. This Court held that individuals who sought judicial dissolution of their marriages but were denied access to the courts solely because of an inability to pay such fees had been denied due process.

In the instant case, however, Petitioner has not been excluded from the courts; indeed, she has taken full advantage of her access to the courts to challenge all adverse rulings. There can be no serious doubt that she

has been given a meaningful opportunity to be heard, and that this opportunity was in the form of an established adjudicatory procedure. Petitioner appears to believe that a trial before a Surrogate is the only established adjudicatory procedure. This is patently absurd, since it would exclude such statutorily permitted procedures as the appointment of a referee or a Judicial Hearing Officer to hear and report or hear and determine a matter. Petitioner has not cited a single case in which these procedures were held to be constitutionally impermissible.

Petitioner also cites *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L. Ed. 2d 372 (1971) and *M.L.B. v. S.L.J.*, 519 U.S.102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) for the proposition that the proceedings in this case were inherently lacking in due process. But these were both cases in which indigent litigants who could not afford to pay mandatory fees were deprived of important legal rights. For this reason, they are not relevant to the instant situation, in which all parties had full access to the courts.

Finally, Petitioner cites *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), in which this Court held that the requirement that persons seeking access to the Bankruptcy Court to discharge debts in bankruptcy pay filing fees had a rational basis and did not deny indigents equal protection of the laws. In so doing, the Court found that a bankruptcy discharge, though important, was not a fundamental right such as those at issue in the *Boddie*, *Mayer* and *M.L.B.* cases.[6]

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[6] In the *Mayer* case, an indigent person convicted of a misdemeanor was unable to afford the fee for a transcript to prosecute an appeal; free transcripts were provided for only in felony cases. In the *M.L.B.* case, the denial of parental rights was at stake, and the appellant was unable to pay the fees to prepare the record for an appeal.

Petitioner contends that her rights were prejudiced because the hearing on her accounting was presided over by a referee, so that the Surrogate who determined the facts had not had the opportunity to observe the demeanor of the witnesses during the hearing. Petitioner also speaks approvingly of the alternative procedure of appointing a Judicial Hearing Officer, a retired judge, as a referee to hear and report. These two positions are irreconcilable; the latter procedure must suffer from the same defect as the former from Petitioner's point of view, since the Surrogate would not have observed any testimony held before a referee, whether the referee was a private attorney or a Judicial Hearing Officer.

Moreover, Petitioner ignores earlier litigation that challenged the appointment of referees to hear and report in New York on due process grounds. That case involved the suspension of a New York attorney pursuant to Judiciary Law §90, which specified that the hearing on the charges of misconduct was to be conducted by a special referee.[7] There, appeals to the New York Court of Appeals were dismissed, and a federal action was commenced. The District Court for the Eastern District of New York dismissed the action, abstaining from interfering in a state attorney discipline matter, and such dismissal was affirmed by this Court, in *Mildner v. Gulotta*, 405 F.Supp. 182 (E.D.N.Y. 1975), *affirmed sub nom. Gerzof v. Gulotta*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976). In a subsequent proceeding for declaratory and injunctive relief against the enforcement of the suspension order on the ground that Judiciary Law §90 was unconstitutional under both the United States

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[7] *In re Gerzof*, 45 A.D.2d 450, 359 N.Y.S.2d 76 (2d Dept. 1974). Motions for leave to appeal in the New York Court of Appeals and for appeal as of right were denied and the appeal was dismissed in *Matter of Gerzof*, 35 N.Y.2d 644, 35 N.Y.2d 855, and 35 N.Y.2d 856.

and New York State Constitutions, the New York court held that attorneys are entitled to due process in disciplinary proceedings, although not to the strict standards imposed in criminal actions.[8]

The state court observed that in the federal case, "Judge Neaher, in what must be ruled dictum, found no merit in the constitutional claims."[9] It then went on to hold as follows:

> "Plaintiff also contends that the Appellate Division, which sat as a trial court, should have heard the witnesses and observed their demeanor before rendering its determination. He claims that the procedures which provided for a determination based upon a transcript and reported findings violated his right to a meaningful hearing. Plaintiff states that the authority for the contention is set forth in Judge Weinstein's dissenting opinion in *Mildner v. Gulotta*, *supra*, 405 F.Supp. at 212, 213. It is important to note that Judge Weinstein relied heavily upon cases involving criminal proceedings in the portion of his opinion which deals with this question. See e.g., *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). Moreover, none of the few civil cases cited by Judge Weinstein holds that proceedings in which a referee to report hears testimony and presents his findings to the court are constitutionally infirm. The procedures followed in attorney disciplinary proceedings are substantially similar to those followed in civil actions when a referee to report is appointed. CPLR § 4320. Plaintiff has not cited nor have I found any

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[8] *Gerzof v. Gulotta*, 87 Misc.2d 768, 775-776, 386 N.Y.S.2d 790, 796 (Sup. Ct. Nassau Co. 1976).

[9] 87 Misc.2d at 770, 386 N.Y.S.2d 793.

authority for the proposition that those procedures are unconstitutional.

. . . .

"Thus, plaintiff was afforded a fair and open hearing and the evidence presented before the referee was reviewed by the ultimate trier of fact. It cannot be concluded that his due process rights were violated by this procedure. See *Javits v. Stevens*, 382 F.Supp. 131 (S.D.N.Y.1974); *Matter of Sarisohn*, [21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276 (1967)]; *Emslie v. State Bar of California*, 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991 (1974)."[10]

In addition to her constitutional claims, Petitioner perceives an ethical problem in Professor Rudenstine's service as referee in this matter, based upon his "undisclosed out-of-court professional relationship with Stephen Schulte of Schulte Roth & Zabel . . . a party and adversary of petitioner. . . ." (Petition, p.10) Petitioner supports this serious charge only with an excerpt from the New York Law Journal from September 8, 1995 (after the testimony had been concluded and when the referee was in the final stages of preparing his report) indicating that Mr. Schulte had been elected to the Board of Directors of the Benjamin N. Cardozo School of Law, where Professor Rudenstine is a member of the faculty. There is no allegation or proof of any relationship other than their joint appearance on a listing of members of the faculty and administration of the school. Such a minimal and ambiguous indication of professional contacts clearly fails to rise to the level at which any ethical problem can reasonably be considered to exist.

Petitioner asserts that the New York Appellate Division, First Department, improperly took inconsistent

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[10] 87 Misc.2d at 776-778, 386 N.Y.S.2d at 797-798.

positions in evaluating her decisions as to financing for JMI, a corporation of which the estate was a half owner. A moment's consideration reveals that the positions are not inconsistent at all. The Court held that a $1,250,000 loan made to JMI by Petitioner as preliminary executor out of estate funds in 1989 was improvident, while also criticizing her refusal to seek a $1,000,000 loan for JMI in 1990 (when the corporation was purportedly less financially sound). The difference in the two situations is that the sources for the loan to be sought in the latter instance would have been outside investors willing to knowingly risk their capital on a loan to a troubled company, while the loan made by Petitioner to prop up a failing company *out of estate funds* constituted a wager which a fiduciary is not permitted to make. An executor may simply not gamble with money belonging to the legatees to whom she owes a fiduciary duty.

THE SURCHARGES IMPOSED BY THE SURROGATE WERE LEGALLY AND CONSTITUTIONALLY APPROPRIATE

Petitioner asserts that the award of counsel fees out of her share of the estate for attorneys for other legatees deprived her of due process rights because she contends that she had no notice or hearing before such award was made. She also contends that the efforts of the attorneys for the other legatees did not benefit the estate. These arguments are erroneous in all respects.

The decision of Surrogate Preminger which made the award of fees that Petitioner seeks to challenge amply summarizes this firm's efforts and how they benefitted and enhanced the estate:

> "The attorneys for the beneficiaries have established, however, that the Court underestimated the extent to which their services benefitted this Estate

> in the removal proceeding and in the identification of estate assets. Greene & Zinner, counsel for Claudia Marsh Applebaum [sic.], acted as lead counsel in the removal proceeding. The firm prepared for and presented evidence at the removal proceeding concerning Lefkowitz' alleged mismanagement of the estate. In addition, it appears that Greene & Zinner were responsible for investigating and identifying the estate assets, some of which were ultimately located in Hong Kong. Moreover, they assisted in the management of the estate corporations after Lefkowitz was removed. . . ."[11]

Accordingly, the benefit to the estate from the efforts of the attorneys for the beneficiaries, both in the removal of Petitioner as Preliminary Executrix and in the augmentation of the estate through the discovery of additional assets which the Preliminary Executrix failed to pursue or uncover, was established by a specific finding of fact by the Surrogate. Since a question of fact cannot be presented to this Court, the keystone of Petitioner's arguments on the point is removed and with it, her arguments collapse.

Petitioner opines that the decision below conflicts with governing statutory and case law in charging her share of the estate with the counsel fees for services provided by attorneys to another beneficiary. However, the applicable statute, SCPA § 2110, clearly authorizes such

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[11] New York Law Journal, February 26, 1998 at 27, reproduced at 26a-27a of the Petition. In this decision, Surrogate Preminger modified the Report of the Referee to the extent of awarding counsel fees to Greene & Zinner, P.C. and to Shea & Gould, attorneys for other beneficiaries, out of Petitioner's share of the estate. This was the second occasion that the Petitioner's estate share was charged for attorney's fees because of her unreasonable and vexatious conduct. On the first occasion, the fees of the executor's attorneys were charged against the Petitioner's share.

a charge, and the case law, properly construed, fully supports the decision below.

Petitioner relies on *Matter of Estate of Campbell*, 138 A.D.2d 827, 525 N.Y.S.2d 745 (3rd Dept. 1988) for the proposition that she should now be afforded an opportunity to defend herself against payment of the fees of the attorneys for other beneficiaries out of her share of the estate. That case is clearly distinguishable from this one on that point, but is nonetheless instructive. There, the estate was a simple one, but the administration of it was unusually protracted, resulting in large fees for the estate attorneys and numerous objections to the final accounting of the administrator. The parties stipulated as to specific issues to be considered by the court, including whether the administrator should be surcharged for any of the fees of the estate's attorneys, and whether the *estate* should be directed to pay the attorney's fees of the beneficiaries objecting to the accounting.

The Surrogate's Court imposed a surcharge for a portion of the estate's legal fees, and also imposed a surcharge for the reasonable legal fees and disbursements of the beneficiaries in connection with the trial of the objections to the accounting. On appeal, the Appellate Division ruled that the lower court was empowered to surcharge an administrator for improper actions, and to charge an administrator personally for legal expenses incurred in establishing such wrongdoing.

The court did not find that there was any legal impediment to a surcharge for payment of legal expenses of estate beneficiaries, as the court below had done. However, it stated that if the stipulation of the parties which framed the issues for the court had specifically limited the issue to whether payment should be made by the estate, then the surcharge may have been beyond the scope of the stipulated issue. Since the actual stipulation

was not in the record, the matter was remanded. Here, of course, there was no stipulation limiting the discretion of the Surrogate in evaluating the appropriate remedies, and no reason for Petitioner, who had already been surcharged for the legal expenses of the executor because of her improper actions, to expect that she would not similarly be surcharged for the legal expenses of the other beneficiaries.

Petitioner cites *Matter of Dillon*, 28 N.Y.2d 597, 319 N.Y.S. 2d 850 (1971) and *Matter of Urbach*, 252 A.D.2d 318, 683 N.Y.S.2d 631 (3rd Dept., 1999) for the proposition that a beneficiary's interest in an estate cannot be charged for the counsel fees of another beneficiary under SCPA §2110. However, those cases are readily distinguishable from the present situation. In *Dillon*, the underlying proceeding was one to vacate the probate of a later will. The efforts of counsel did not directly enhance the estate or obtain redress for improper activities by any party. In *Urbach*, the matter concerned frivolous objections to a final accounting. Again, no questions of enhancement of the estate or misdeeds by any party were involved. As specifically stated in *Urbach* (*Id.*, at 633), the Court's decision was based upon the general common law requirement that all parties to a controversy pay their own counsel fees. It was in this context that the Court in *Urbach* relied upon *Dillon*.

The present situation, however, is substantially different. Here, the efforts of the attorneys for the beneficiaries were specifically found by the Surrogate to have benefitted the estate by bringing about the removal of Petitioner as Preliminary Executrix (together with the surcharge of Petitioner for serious misdeeds) and the discovery of additional assets which substantially enhanced the estate. Thus, the instant situation contains factors not present in the *Dillon* and *Urbach* cases: viz , the positive

and substantial benefits to the estate accomplished through the efforts of the attorneys for the beneficiaries, and the wrongdoing of the Petitioner. These factors amply justify the exercise by the Surrogate of the powers granted in SCPA §2110 (2) to "direct payment [of compensation of an attorney] from the estate generally or *from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested.*" (emphasis added.)

It is noteworthy that in the decision awarding the fees of the attorneys for the beneficiaries, the Surrogate specifically directed that: "Such fees shall be charged directly against Lefkowitz' share of the estate pursuant to the July 29, 1997 decision."[12]

The July 29, 1997 decision is also annexed to the Petition, at pp. 28a to 38a. In that decision (Petition, p. 34a), in discussing the award of fees to the executor's counsel, the Surrogate stated as follows:

> "Despite the general rule that a party to a lawsuit cannot require his adversary to pay his legal expenses (*Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 NY2d 1), an errant fiduciary may be surcharged for the legal expenses incurred in establishing his wrongdoing and obtaining recoupment. [citations omitted]. Ms. Lefkowitz's conduct which precipitated the removal proceeding is such a case. Accordingly, the legal fees incurred by counsel to BNY in the removal proceeding shall be charged directly against Ms. Lefkowitz's share of the estate."

Petitioner insists that an award of fees to the attorney for one beneficiary from the estate share of another beneficiary is improper under New York Law. However,

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[12] New York Law Journal, February 6, 1998 at 27, reproduced at p. 27a of Petition.

Estate of Burns, 130 Misc.2d 317, 496 N.Y.S.2d 921 (Surrogate's Court, Broome County, 1985); *affirmed* 126 A.D.2d 809, 510 N.Y.S.2d 732 (Third Dept., 1987) presents a case in which wrongdoing by a party was a factor, and in which the Court awarded counsel fees for the attorney retained by one beneficiary from the estate share of another beneficiary. There, Joseph Burns was over eighty years old and mentally ill at the time his niece obtained a power of attorney from him and caused seven bank accounts comprising his entire estate to be changed to joint tenancy with her or accounts in trust for her. Upon the death of Joseph Burns at age eighty-five, his niece took the position that all assets had passed to her by operation of law and that there was thus no estate to probate. Letters of Administration, C.T.A. were issued to the Commissioner of Finance of Broome County, who commenced a discovery proceeding. The nephew of Joseph Burns was granted the right to intervene in the proceeding, and all of the subject bank accounts were determined to be the property of the estate. The nephew sought allowance for his attorney's fees from the estate or from the share of the niece in that estate.

The Court stated that:

> "The cases interpreting these statutes and their predecessors in the law have held that where legal services have been rendered for the benefit of the estate as a whole resulting in the enlargement of all the distributive shares of all legatees or distributees, reasonable compensation should be granted from the funds of the estate. See *Matter of Lounsberry*, 226 A.D. 291, 234 N.Y.S. 680; *Matter of Bellinger*, 55 A.D.2d 448, 390 N.Y.S.2d 739; *Matter of Smith*, 167 Misc. 95, 3 N.Y.S.2d 503. . . .
>
> ". . . Additionally, simple justice dictates that [the niece] should bear the greater share of the

> financial burden placed upon the estate by her wrongful withholding of assets. Therefore, this Court concludes that the Intervenor-Petitioner's attorney is entitled to be paid from the assets from the estate for his services."[13]

The Court pointed out that although the nephew had been an Intervenor, he was certainly the principal player and mover in the litigation. The Court also stated that, although the niece had contended that the services of the attorney for the Intervenor had duplicated those of the attorney for the Administrator, it was clear that they had worked in concert as a team without duplicating or overlapping in their presentation of the evidence.

The Court went on to state that:

> "The cases that the Respondent cites in her memorandum opposing this petition were generally cases wherein the Court has found the application for allowances has not benefitted the estate. Since our findings here are that the Intervenor-Petitioner has benefitted the Estate, the cases cited are not germane to the issue."[14]

The Court allowed a fee to the attorney for the Intervenor and ordered that it be paid one-half from the general funds of the estate and one-half from the niece's share of the estate.

In the past, Petitioner has insisted that the *Burns* case is distinguishable from the present situation in that there it was a wrongdoing *beneficiary*, while here the wrongdoer was a *fiduciary*. If anything, that distinction should militate even more strongly for the payment of counsel fees to the attorneys for the other beneficiaries out of the

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[13] 130 Misc.2d at 319-320, 496 N.Y.S.2d at 923-924.

[14] 130 Misc.2d at 322, 496 N.Y.S.2d at 925.

Petitioner's share of the estate, since her wrongdoings breached her fiduciary responsibilities toward the beneficiaries in addition to damaging the estate.

Petitioner also insists that the decision below conflicts with *Estate of Bellinger*, 55 A.D.2d 448, 390 N.Y.S.2d 739 (Fourth Dept.,1977), a decision upon which the Surrogate specifically relied in making the award of counsel fees.

In *Bellinger*, the Court quoted from *Matter of Graves*, 197 Misc. 638, 639, 95 N.Y.S.2d 310, 311, in stating the general rule regarding the award of compensation:

> ". . . where legal services have been rendered for the benefit of the estate which result in enlargement of the distributive shares of the estate beneficiaries, reasonable compensation should be granted out of the estate for such services. This is particularly so in a case where, because of *interests of the executors adverse to those of the beneficiaries*, justice may not be done except for the performance of legal services by counsel for the beneficiaries. In such case the personal interests of the executors cause them and their counsel, in effect, to step aside and to permit those whose interests are not inimical to the estate in general to protect the rights of the estate. Even in such case, however, the services rendered must be substantial, and must be directed toward a bona fide issue, and may not be merely nominal in overcoming an obviously erroneous claim by the fiduciary."[15]

The Court stated that the test of whether the estate benefits from the efforts of counsel for the beneficiaries is whether the distributees become entitled to receive

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[15] 55 A.D.2d at 451, 390 N.Y.S.2d at 741; emphasis added by *Bellinger* Court.

greater sums from the estate than might otherwise have resulted without the efforts of those applying for the award of fees.

The *Bellinger* Court found it abundantly clear that the attorneys for the beneficiaries had been more than merely volunteers acting on behalf of their own clients in the case. In fact, the Court found that they had "supplied the kinetic force that moved the bank to action in that they performed a major portion of the necessary work to bring this case to a successful conclusion." [16]

Here, the Surrogate held that Greene & Zinner, P.C. had been the lead counsel in removing Petitioner as the Preliminary Executrix and had been responsible for uncovering assets which were subsequently folded into the estate, and that Shea & Gould had actively participated in the removal of the Petitioner. Thus, the *Bellinger* case fully supports the award of fees to these firms from Petitioner's share of the estate.

The other issues raised by Petitioner with respect to the award of counsel fees are completely without merit. That is, the Petitioner asserts that the award of fees out of her share of the estate deprives her of property without due process of law because she claims that the cause of action upon which relief was granted was different from that originally brought before the Court, and that she was not afforded a hearing. These assertions are completely fallacious.

The cause of action did not change between the pleading and the decision; Greene & Zinner, P.C. sought an award of counsel fees for the services which materially benefitted the estate. The Surrogate exercised her discretion, in light of the demonstrated wrongdoing by the Petitioner, to award such counsel fees from the Peti-

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[16] 55 A.D.2d at 452, 390 N.Y.S.2d at 742.

tioner's share of the estate. There was only one cause of action, and it did not change.

For Petitioner to assert that there was no hearing afforded to her is completely unfathomable in light of the forty-eight sessions of hearings on the application for counsel fees and other issues, in which Petitioner took part. Moreover, the Surrogate's award of the counsel fees out of Petitioner's estate share could not have been a complete surprise to her, since such a request was specifically made by Shea & Gould and a similar award had been made of the fees of the executor's attorneys.

Finally, Petitioner asserts that she should not have been surcharged for the fees of the attorneys for the beneficiaries because the estate was not augmented by their actions, citing *Estate of Heilbronner*, 39 Misc.2d 912, 242 N.Y.S.2d 118 (Surr. Ct. N.Y. Co. 1963). That case held that a mere reduction in fees payable by the estate was not sufficient to justify payment of the fee of the attorney for residuary legatees out of the estate. Accordingly, it is not relevant to the instant situation, in which the Surrogate made a specific finding of fact that the attorneys for the beneficiaries had benefitted the estate by revealing the mismanagement of the estate by Petitioner and by identifying estate assets.[17]

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[17] New York Law Journal, February 6, 1998, p.27, reproduced in the Petition at 26a-27a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1462

IN THE

Supreme Court of the United States

ADRIENNE LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENTS LORETTA M. FINE AND LAUREN FINE

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Petitioner meet the jurisdictional requirement of 28 U.S.C. § 1257 that: "the validity of a statute of any State be drawn into question by the highest court of a State on which a decision could be had on the ground of its being repugnant to the Constitution . . ."?

2. Is the New York Surrogate's Court Procedure Act ("SCPA") § 506 repugnant to the Constitution?

3. Are there any compelling federal issues involved in the hearing by a referee to report the accounting of the Petitioner who was the Executor of a decedent's estate?

TABLE OF CONTENTS

	Page
Counter-Statement of the Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Introductory Statement	1
Statement of the Case	1
Restatement of Facts	2
Reasons for Denying the Writ	5
I. The Petition Fails To Meet The Requirements Of 28 U.S.C. § 1257 Due To The Fact That The Issue Of The Constitutionality Of SCPA § 506 Was Not Drawn Into Question By Any Of The Courts That This Proceeding Was Heard Before.	5
II. The Appointment Of A Private Attorney As A Referee To Conduct A Hearing And Report His Findings And Conclusions To The Surrogate Pursuant To SCPA § 506(1) Is Not Unconstitutional.	11
Conclusion	17

TABLE OF CITED AUTHORITIES

	Page
Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997)	9
Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)	15
Cleary v. Board of Education of the Binghamton City School District, 243 A.D.2d 949, 663 N.Y.S.2d 374 (3d Dept.1997)	6
Matter of Bennett, 111 A.D.2d 168, 488 N.Y.S.2d 796 (2d Dept 1985), *appeal denied*, 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134, *certiorari denied*, 106 S. Ct. 178, 474 U.S. 862, 88 L. Ed. 2d 148	6
Matter of Checchia v. Tioga County Board, 231 A.D.2d 752, 647 N.Y.S.2d 298 (3d Dept 1996)	6
Matter of Leslie's Jewelry v. Tax Appeals, 238 A.D.2d 129, 655 N.Y.S.2d 36 (1st Dept 1997)	6
Matter of Rivera v. Cassas, __ A.D.2d __, 713 N.Y.S.2d 689 (2d Dept 2000)	6
Matthews v. Eldridge, 424 U.S. 319 (1976)	13
Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950)	13

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Page

Street v. New York, 394 U.S. 576 (1969) 8

United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) 15

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Statutes, Regulations and Treatises:

CPLR § 1012 7

CPLR § 1012(d) 6

Executive Law § 71 ..... 6, 7

SCPA § 506 ..... *passim*

SCPA § 506(1) 4, 11, 14

28 U.S.C. § 1257 ..... i, 1, 5, 11

28 U.S.C. § 1257(a) 1, 5, 7

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McKinney's Practice Commentaries SCPA § 506 by David Siegel and Patrick M. Connors 12

INTRODUCTORY STATEMENT

Petitioner has sought the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), seeking the grant of a Writ of Certiorari on the basis that SCPA § 506, as applied, is unconstitutional and fails to meet minimal constitutional standards.

The Petitioner argues, *inter alia,* that this matter is of federal importance for the following reasons: (1) a trial held by a private attorney appointed by the court as a referee to report, without consent of the parties, is fundamentally abhorrent to the requisites of the United States Constitution; (2) "the wealthy should be afforded the same due process and equal protection as ordinary citizens"; and (3) due to the deductibility of the fees of an appointed referee, as applied to the United States Estate Tax, SCPA § 506 will cause the federal government to lose revenues

STATEMENT OF THE CASE

The Petition fails to meet the jurisdictional requirements of 28 U.S.C. § 1257 and fails to present any compelling federal reason why this Court should grant a Writ of Certiorari. Therefore, the Petition should be denied. A Writ of Certiorari should not be granted for the following reasons:

1. Due to the fact that the Attorney General of the State of New York was not made a party to the Surrogate's Court proceeding or the Petitioner's appeal to the Appellate Division, review of the constitutionality of SCPA § 506 was barred under New York law and, therefore, the requirement of 28 U.S.C. § 1257 that the validity of a state statute had to have been drawn into question by the highest court of a state in which a decision may be had has not been met.

2. As a result of the Petitioner's failure to effectively raise substantial federal issues in her Briefs to the Appellate Division, the decision of the Appellate Division is silent on the federal questions raised in this Petition to the Court.

3. The Petitioner fails to set forth any substantial argument to the effect that SCPA § 506 is unconstitutional on its face or as applied.

4. The Petitioner fails to present any arguments which set forth any compelling federal issues involved in her Accounting Proceeding.

RESTATEMENT OF FACTS

Nicholas Marsh (the "Decedent") died on March 15, 1988, leaving a will dated May 26, 1983 (the "Will"). His wife, Irene Marsh, executed a mutual will on the same date wherein two trusts were created for the survivor of them (a "Credit Shelter Trust") and (a "Marital Deduction Trust"), with the remainder of each trust passing upon the subsequent death of the survivor as follows: thirty (30%) percent outright to a daughter, Adrienne Lefkowitz (the "Petitioner"), thirty (30%) percent in trust for a daughter, Claudia Appelbaum ("Claudia"), twenty (20%) percent in trust for a daughter, Loretta Fine ("Loretta"), ten (10%) percent in trust for Loretta's daughter, Lauren Fine ("Lauren") and ten (10%) percent in trust for the petitioner's daughter, Julie Lefkowitz ("Julie").

The Decedent's will named Irene and the Petitioner as co-executors, named Irene, the Petitioner and the Bank of New York ("BNY"), as trustees of the Credit Shelter Trust, and named Irene and the Petitioner, as trustees of the Marital

Deduction Trust. The Petitioner was named as the sole trustee of each of the trusts to be created for the benefit of Claudia, Loretta, Lauren and Julie. On October 2, 1986, Decedent executed a codicil to the Will which removed Irene as co-executrix and co-trustee under his will and the Petitioner was named as the sole executrix. By order of the Surrogate's Court of New York County, on or about April 26, 1988, the Petitioner was granted preliminary letters testamentary to administer the estate of Nicholas Marsh (the "Estate").

By notice dated December 20, 1988, a motion was made to remove the petitioner as preliminary executrix. On March 19, 1990, the Surrogate suspended the petitioner's preliminary letters testamentary and ordered an immediate hearing to permanently remove the preliminary executrix. A hearing on her permanent removal was conducted and on April 19, 1990, the Surrogate issued a decision which removed the Petitioner as preliminary executrix and barred her from qualifying as permanent executrix and permanent trustee.

On December 21, 1990, the Petitioner filed a verified petition for an accounting as former preliminary executrix (the "Accounting"). In 1991, BNY filed its objections to the accounting. In July, 1993, BNY filed amended objections to the accounting.

In addition, a proceeding entitled *Application of Shea & Gold, Attorneys for Loretta M. Fine and Lauren Fine, Remainder Beneficiaries of the Estate of Nicholas Marsh, a/k/a Nicholas V. Marsh to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh* and a proceeding entitled *Application of Greene & Zinnia, P.C., Attorneys for Claudia Marsh*

Appelbaum, remainder beneficiary of the Estate of Nicholas Marsh a/k/a Nicholas V. Marsh to Fix their Fees and to Receive Payment of Such Fees from the General Assets of the Estate of Nicholas Marsh, Deceased (the "Fee Applications") were consolidated with the Accounting proceeding for purposes of the hearing.

The hearings on the Fee Applications and the Accounting took place intermittently from May 11, 1994 through January 3, 1995 before Professor David Rudenstine, who had been appointed *sua sponte* by Surrogate Preminger pursuant to SCPA 506(1). On June 19, 1995, on motion by Referee Rudenstine, with notice to all interested parties, including Petitioner, which motion was unopposed, the Referee requested interim fees. The Surrogate fixed the Referee's interim fees at $108,258.50. Thereafter, pursuant to this order, the Bank of New York, as executor of the estate of Nicholas V. Marsh, made payment of such amount to Referee Rudenstine.

On December 1, 1995, Referee Rudenstine issued a 145 page report which, in part, recommended the Petitioner be surcharged in excess of $1,200,000, plus interest, due to her activities as preliminary executrix. On July 29, 1997, the Surrogate issued a decision that confirmed in part, and rejected in part, the Referee's report. In February, 1998, after a motion to reargue was made by the attorneys for the beneficiaries concerning the rejection of their respective Fee Applications, the Surrogate altered the Referee's recommendation that attorney fees not be issued to the beneficiaries' attorneys and awarded $250,000 to the law firms for Loretta and Lauren, and Claudia. The Surrogate ordered that such fees be paid out of the Petitioner's interest in the Estate.

A decree incorporating the decision of the Surrogate was signed by the Surrogate on April 23, 1998. The New York Appellate Division, First Department, by decision dated October 26, 1999, affirmed the Surrogate's decision. The Appellate Division subsequently denied Petitioner's motion to reargue and denied Petitioner's motion for leave to appeal to the Court of Appeals. The New York Court of Appeals subsequently denied Petitioner's motion for leave to appeal to the Court of Appeals and *sua sponte* denied her appeal as of right for lack of a valid constitutional question.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO MEET THE REQUIREMENTS OF 28 U.S.C. § 1257 DUE TO THE FACT THAT THE ISSUE OF THE CONSTITUTIONALITY OF SCPA § 506 WAS NOT DRAWN INTO QUESTION BY ANY OF THE COURTS THAT THIS PROCEEDING WAS HEARD BEFORE.

28 U.S.C. § 1257(a), under which Petitioner seeks jurisdiction of this Court, states in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . .

The decision of the Appellate Division, First Department in this matter (Petition pp. 3a-5a) contains no discussion concerning the constitutionality of SCPA § 506. Nor is there any mention of the federal issues raised in the Petition for Writ of Certiorari. There are a number of reasons for this, but the primary reason is that under New York law the Appellate Division had no authority to determine the constitutionality of SCPA § 506.

Section 71 of the New York Executive Law and Section 1012(d) of the New York Civil Practice Law and Rules (CPLR") provide that if the constitutionality of a state statute is brought into question, notice be given to the attorney general of the State of New York. The New York courts have consistently held that constitutional challenges to statutes are unreviewable and barred if notice is not given to the New York attorney general sufficient to permit the attorney general to have the opportunity to intervene in the proceedings. *See Matter of Bennett*, 111 A.D.2d 168, 488 N.Y.S.2d 796, (2d Dept. 1985), *appeal denied*, 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134, *cert. denied*, 106 S. Ct. 178, 474 U.S. 862, 88 L. Ed. 2d 148, *Matter of Rivera v. Cassas*, __ A.D.2d __, 713 N.Y.S.2d 689 (2d Dept. 2000); *Cleary v. Board of Education of the Binghamton City School District*, 243 A.D.2d 949, 663 N.Y.S.2d 374 (3d Dept. 1997); *Matter of Checchia v. Tioga County Board*, 231 A.D.2d 752, 647 N.Y.S.2d 298 (3d Dept. 1996) *Matter of Leslie's Jewelry v. Tax Appeals*, 238 A.D.2d 129, 655 N.Y.S.2d 36 (1st Dept. 1997).

The New York Attorney General was not notified either with respect to the Surrogate's Court proceeding or the Petitioner's appeal to the Appellate Division, First Department. Therefore, Petitioner fails the test of

28 U.S.C. § 1257(a), since a decision with respect to the constitutionality of SCPA § 506 was barred and could not have been determined by either the Surrogate's Court or the Appellate Division, First Department, which was the highest court in which a decision was had, due to the failure to notify the attorney general pursuant to the provisions of Executive Law § 71 and CPLR § 1012.

Second, in the Petitioner's statement contained in the section of the Petition "Where Issues Were First Raised and Preserved" states that the issue of the constitutionality of SCPA §506 was first raised in Petitioner's Brief to the Appellate Division. Since the Petitioner had not raised the issue of constitutionality in the lower court, she had waived her right to raise this issue in the Appellate Division.

Finally, neither the Surrogate's Court nor the Appellate Division, First Department mentioned any constitutional issues in their respective decisions. The third reason that the Surrogate's Court failed to discuss federal issues was that the issues were never raised in the Petitioner's submissions to that Court. A review of the Petitioner's Briefs submitted to the Appellate Division will leave no doubt as to why the Appellate Division made no mention of Petitioner's federal issues. The Petitioner's Brief to the Appellate Division paid merely "lip service" to the federal issues that she now claims to be "compelling federal issues". The table of contents of Petitioner's brief is virtually void of any indication that petitioner is requesting a finding that SCPA § 506 is unconstitutional. The closest the Petitioner comes to this issue is in Point VI which states that: "Appellant was denied her constitutional right to a fair hearing before an appropriate tribunal".

A review of the Questions Presented in Petitioner's Brief would find that of the eight questions submitted by the Petitioner, the only question that raises any federal issue is Question Eight which states: "Was appellant denied her constitutional due process rights to a fair hearing?"

Street v. New York, 394 U.S. 576 (1969) states:

> . . . This Court has stated that when. . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. *See, e.g., Bailey v. Anderson, supra*; *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

This Court has further stated:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, ibid., by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981). We have described in different ways how a petitioner may satisfy this requirement. *See, Street v. New* York, 394 U.S. 576, 583-585 (1969). In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time

> and in the manner required by the state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (quoting *Webb, supra*, at 501), *see*, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962), or to persuade U.S. that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, *see*, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982). In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980). See generally 16B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4022, pp. 322-339 (1996).

Adams v. Robertson, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997).

Although no state court has passed upon the federal questions raised in her Petition, the Petitioner never even attempted to meet the burden of proof to defeat the assumption that the federal issues were not properly presented to the Appellate Division.

The Petitioner's Brief was seventy pages long, yet the following was the sum total of her "constitutional argument".

"The case law, statutory law, due process, and facts do not support the Surrogate". (Petitioner's Brief p. 14; "PB-14").

"This appeal raises the issue of the legality, indeed the constitutionality, of the appointment of a Referee to Hear and Report . . ." (PB-61).

"If SCPA §506 permits such appointments, it is constitutionally invalid." (PB-61).

". . . the Court's failure to reject the Referee's findings that favored his payor, BNY, will result in the denial of a fair hearing and due process to the Appellant . . ." (PB-64).

"Thus the reference in lieu of a hearing by a Court is of constitutional dimensions." (PB-64).

"In addition to the infirmities set forth above, various rulings and evidentiary errors also denied appellant her constitutional rights to due process and a fair hearing." (PB-64.)

". . . The error of the Referee in not allowing appellant to make motions to quash the trial non party subpoenas duces tecum pursuant to CPLR 2304 deprived the appellant of her constitutional rights to a fair trial, due process, and equal protection of the law . . ." (PB-66.)

"Under all these circumstances it is clear the appellant was denied her constitutional right to a fair hearing and her property was taken from her without due process of law. The due process requirements of the Fifth and Fourteenth amendments apply to state laws." (PB-70). (Unfortunately, the appellant never sets forth what the due process requirements are).

"Appellant's due process rights to a fair hearing before an appropriate tribunal were repeatedly violated." (PB-57)

"Appellant has been deprived of . . . her interest in the estate as a consequence of the constitutionally infirm hearing. This is a 'taking' of property without due process of law." (PB-57).

Based upon her Brief to the Appellate Division, First Department, the Petitioner cannot meet her burden of showing that her federal issues were properly presented.

As a result of the above, the Petitioner has failed to meet the requirements at 28 U.S.C. § 1257, which are necessary for this Court to obtain jurisdiction over this matter.

II.

THE APPOINTMENT OF A PRIVATE ATTORNEY AS A REFEREE TO CONDUCT A HEARING AND REPORT HIS FINDINGS AND CONCLUSIONS TO THE SURROGATE PURSUANT TO SCPA § 506(1) IS NOT UNCONSTITUTIONAL.

SCPA § 506 states in relevant part:

> (1) In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report.

SCPA § 506 deals with the appointment by the Surrogate of a referee to report, as opposed to a reference to determine. The differences between the two are as follows:

> With a reference to determine, the referee sits as the equivalent of the court itself, . . . , and the referee's judgment or order is final except for appeal. The reference to report is the equivalent of a verdict by an advisory jury: the court can take or leave the report, make new findings at its own option, and decide accordingly.
>
> Under SCPA 506(1), the court may appoint a referee to report on all of the facts, or on a specific question of fact, or on the law and the facts of both. A reference to report may not be employed in any proceeding instituted for the probate of a will or where *a constitutional right to trial by jury exists and is demanded.* (emphasis added). SCPA § 506, McKinney's Practice Commentaries, by David Siegel and Patrick M. Connors.

Contrary to a statement made on page "11" of the Petition, prior usage of SCPA § 506 did not require consent of the parties. The Petitioner has consistently confused paragraph "1" of SCPA § 506 with paragraph "6". Paragraph "6" was added to SCPA § 506 in 1971 and requires consent of the parties in order to appoint a chief clerk, one of the other clerks, a court attorney or any assistant to take testimony in a proceeding. However, whether consent is or is not required, the appointment of a referee or any person other than a judge to hear testimony and report is not, in and of itself, abhorrent to due process or equal protection requisites found in the United States Constitution.

This Court has not made a determination that the appointment of a person other than a judge to hear evidence or make a decision is on its face unconstitutional. The issue raised is always whether or not, within the parameters of that appointment, the due process rights of the parties are protected. "The guarantees of due process call for a hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313 (1950); *United States v. Raddatz*, 447 U.S. 667 (1980).

> In *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court ". . . emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied: (a) the private interest implicated; (b) the risk for an erroneous determination by reason of the process accorded and the probable value of added procedural safeguard; and (c) the public interest in administrative burdens, including costs that additional procedures would involve;" *United States v. Raddatz*, *supra*.

The Petitioner has not even attempted to discuss how the appointment of a referee in her Accounting Proceeding measured up against these three factors.

The *Raddatz* case was a criminal matter where a magistrate had been appointed to resolve a suppression motion. Even though the resolution of a suppression motion can often determine the outcome of a case, and even though evidence not otherwise admissible at trial may be admissible at a suppression hearing and the disclosure of an informant's identity may not be admissible, this Court held that the defendant's due process rights were protected, even though

a magistrate was appointed over objections of the defendant. This was certainly a circumstance where the protection of the defendant's due process rights, where he could lose his freedom, was far more important than Petitioner's rights as an Accounting fiduciary. Therefore, the Petitioner's interest fails the first part of this test.

Under Section 506(1) of the SCPA, the report and conclusions of the referee have no binding effect. Procedurally, the findings of fact and conclusions of the referee must be confirmed by the Surrogate before the findings have any legal effect. Of course, the Surrogate may disregard all or any part of the referee's findings. In addition, once a decree is entered, the parties have the right to appeal as a matter of right to the Appellate Division.

As a result of this procedure, the Petitioner had two opportunities to object to the referee's procedures, including any due process violations that she believed she had suffered during the hearing. The fact that this particular Referee, or any magistrate or any hearing officer, may improperly conduct a hearing, and, as a result, may compromise an individual's rights, is an issue to be decided on a case by case basis. Because of the safeguards described above, the fact that a particular referee in a particular instance may have violated an individual's due process rights does not mean that the statute itself violates the due process rights of all parties. Therefore, it is apparent that the risk for an erroneous determination by reason of the process set forth in SCPA 506(1) is minimal due to the ability of a party to have input into the Surrogate's decision, to file motions to confirm or reject the report, and to appeal to the Appellate Division. As a result, the Petitioner also fails the second part of the three-pronged test.

The Petitioner cites *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973), for the proposition that there is a due process right of access when fundamental rights are at issue and a State exclusively controls adjusting the legal relationships involved. 409 U.S. at 445. She goes even farther extending this right to the wealthy. However, a review of *Kras* clarifies that this statement cannot be read in a broad context. In fact, in *Kras*, this Court rejected a poor person's right to access to the bankruptcy court for lack of filing fees and clarified that the right to access only applies in circumstances where the state exclusively controls legal relationships. For example, in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), the parties were too poor to file a petition for divorce and had no other recourse but to obtain a divorce through the courts. As a result, this Court held that the parties could not be kept out of court due to the lack of a filing fee. There are similar decisions with respect to criminal cases and welfare cases.

The Petitioner also argues, once again, citing *Boddie*, that ". . . the statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure and act is a legitimate exercise of state power is beyond question." 401 U.S. at 379. However, in quoting from *Boddie*, the Petitioner fails to include the second sentence in that paragraph, which indicates that the sentence cited only applies in cases involving religious freedom, free speech or assembly. The next sentence states: "Thus, in cases involving religious freedom, free speech or assembly, this court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights". This procedure would not be applied in determining the constitutionality of a state

statute based on the fact that one individual at one hearing was not given his or her full due process rights in an estate accounting proceeding.

It should be pointed out that the hearings which took place with respect to the Accounting were held over a period of more than six months and took up more than 18,000 pages of transcripts. Certainly, the petitioner had a substantial opportunity to be heard.

The balance of the Petitioner's argument contain specific instances in which she felt that she was wronged and her due process rights were violated. Once again, *assuming arguendo*, that her due process rights were violated, the Petitioner had ample opportunity to be heard with respect to her motion to confirm, to reject the referee's findings, her motion to reargue the referee's findings, her appeal to the Appellate Division, First Department, her motion to reargue to the Appellate Division, First Department and her motions for leave to appeal to the Court of Appeals as well as her attempt to appeal as of right to the New York City Court of Appeals. Certainly, she has had adequate opportunity to protect her rights.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 19 2001

(4)

No. 00-1462

IN THE

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

-v-

THE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION ON BEHALF OF THE RESPONDENT, THE BANK OF NEW YORK, AS EXECUTOR

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Petitioner adequately raise, preserve and press the purported constitutional issue in the proceedings below?

2. Are there any compelling reasons why this Court should grant review of the proceedings held before a Referee to hear and report in this Estate Accounting Proceeding?

3. Where the Petitioner, an attorney, knowingly and voluntarily participated in and sought affirmative relief based upon the proceedings before the Referee, appointed to hear and report in an Estate Accounting, without seeking a stay or appealing the order of appointment, should this Court grant a Writ of Certiorari?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

Adrienne Marsh Lefkowitz — Petitioner
323 S. Doheny Drive, Apt. 207
Los Angeles, CA 90048
the accounting party, nominated fiduciary,
only outright beneficiary
pro se

The Bank of New York as Executor — Respondent
of the Estate of Nicholas Marsh
123 Main Street
White Plains, NY 10602
the objectant to the Lefkowitz accounting
represented by:
McCarthy, Fingar, Donovan, Drazen & Smith
11 Martine Avenue
White Plains, NY 10606
and Executor of the Estate of Irene Marsh — Respondent
formerly trust beneficiary

Stuart Salles, Esq. — Respondent
267 Broadway
New York, NY 10007
former temporary administrator of the estate
pro se

Loretta Marsh Fine — Respondent
150 East 69th Street
New York, NY 10021
trust beneficiary
represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

Claudia Marsh Appelbaum — Respondent
The Bluff
West Summit Road
Tuxedo Park, NY 10987
trust beneficiary
represented by:
Greene & Zinner
202 Mamaroneck Avenue
White Plains, NY 10601

Greene & Zinner, P.C. — Respondent
202 Mamaroneck Avenue
White Plains, NY 10601
fee petitioner *pro se* (and counsel to
Claudia Marsh Appelbaum)

Schulte Roth & Zabel — Respondent
919 Third Avenue
New York, NY 10022
fee petitioner
represented by:
D'Amato & Lynch
70 Pine Street
New York, NY 10270

Shea & Gould
fee petitioner
(In bankruptcy by time of 1994 hearing,
did not appear at 1994 hearing or submit briefs.)

Julie Lefkowitz — Respondent
323 S. Doheny Drive, #207
Los Angeles, CA 90048
trust beneficiary who did not appear

Lauren Fine — Respondent
1151 N. Atlantic Boulevard
Ft. Lauderdale, FL 33304
trust beneficiary
Represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

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The Capitol
Albany, NY 12224

CORPORATE DISCLOSURE STATEMENT
RE THE BANK OF NEW YORK

The Bank of New York is a subsidiary of The Bank of New York Co., Inc., a publicly traded company trading as BK, with headquarters at One Wall Street, New York, N.Y. 10286.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW ii

CORPORATE DISCLOSURE STATEMENT iv

STATEMENT OF THE CASE 1

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF THE FACTS 2

POINT I

THE PURPORTED CONSTITUTIONAL ISSUES WERE NOT ADEQUATELY RAISED OR PRESSED BELOW AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 12

A) No Constitutional or Federal Questions Were Pressed Or Preserved 13

POINT II

THE PETITIONER'S ACQUIESCENCE IN THE PROCEEDINGS BEFORE THE REFEREE BARS ANY COMPLAINT ABOUT HIS APPOINTMENT 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed.2d 62 7

Booke v. Joy, 88 A.D.2d 569, 451 N.Y.S.2d 393 (N.Y. App. Div., 1st Dep't 1982) *app. denied* 57 N.Y.2d 607 (1982) 13

Chalu v. Tov-Le Realty Corp., 220 A.D.2d 552, 632 N.Y.S.2d 806 (N.Y. App. Div., 2d Dep't. 1995) 28 U.S.C. §1257 16

Cleary v. Board of Education, 243 A.D.2d 949, 953, 663 N.Y.S.2d 374 (N.Y. App. Div., 3d Dep't. 1997) 15

Crumpacker v. Indiana Supreme Court Disciplinary Comm'n., 470 U.S. 1074, 1074-1075, 105 S. Ct. 1829, 85 L. Ed.2d 130 (1985) 15

Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902) 14

Ex Parte Peterson, 253 U.S. 300, 311, 40 S. Ct. 543, 547 (1920) 9

Hernandez v. New York, 500 U.S. 352, 366, 111 (S. Ct. 1859), 114 L Ed.2d 395 (1991) 14

Hodges v. Snyder, 261 U.S. 600, 601, 43 S. Ct. 435, 67 L. Ed.2d 819 (1923) 15

Page(s)

Illinois v. Gates, 462 U.S. 213, 218-219, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983) 14

In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999) 4

In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759 (2000) .. 4, 11

In re Marsh, 2000 N.Y. Lexis 3895 (Dec. 21, 2000) ... 5, 11

In re Marsh, ___ N.Y.2d ___(N.Y. Dec. 21, 2000) Appendix 1A (2000 Lexis No. 3895 NY) 7

In re Marsh, 78 N.Y.2d 990, 580 N.E.2d 758 (1991) 10

In re Marsh, 79 N.Y.2d 751, 587 N.E.2d 289 (1991) 10

In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999) 11

In Re Marsh, ___ A.D.2d ___ (1st Dept. 2000) denied 95 N.Y.2d 755, 712 N.Y.S.2d 447, 734 N.E.2d 759 (2000) 11

Mtr. of Luckenbach, 189 Misc. 529, 72 N.Y.S.2d 76 (Surr. Ct. Kings 1947) *aff'd* 272 App. Div. 928 (N.Y. App. Div., 2d Dep't. 1947) 9

Matter of Marsh, 173 A.D.2d 336, 575 N.Y.S.2d 284 (N.Y. App. Div., 1st Dep't 1991); appeal dismissed, 78 N.Y.2d 990, 580 N.E.2d 758 (1991); mot. for leave to appeal denied, 79 N.Y.2d 751, 587 N.E.2d 259 10

Page(s)

Steck v. Colorado Fuel & Iron Co., 142 N.Y. 236, 37 N.E. 1 (1894) 9

TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed.2d 366 (1993) .. 14

Webb v. Webb, 451 U.S. 493, 458, 101 S. Ct. 1889, 68 L. Ed.2d 391 (1981) 14

Statutes:

Federal Rules of Civil Procedure Rule 53(b) 9

N.Y. CPLR §1012 ..... 4, 7, 15

N.Y. Executive Law §71 ..... 4, 7, 15

N.Y. S.C.P.A. §506 ..... 4, 6, 7
N.Y. S.C.P.A. §506(1) 2, 8, 10
N.Y. S.C.P.A. §506(2) 7
N.Y. S.C.P.A. §506(4) 8

28 U.S.C. §1257 ..... 1, 11, 12, 14

Supreme Court Rule 10 ..... 1, 11, 12, 14

THE RESPONDENT, THE BANK OF NEW YORK, EXECUTOR OF THE ESTATE OF NICHOLAS V. MARSH, OFFERS THIS BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI BROUGHT BY THE PETITIONER, ADRIENNE MARSH LEFKOWITZ

STATEMENT OF THE CASE

The Petition in this Estate Accounting Proceeding does not present any significant constitutional issues -- nor does it present any compelling reasons why a Writ of Certiorari should be granted. Discretionary review by this Court should be denied under 28 U.S.C. §1257 and Supreme Court Rule 10. Discretionary review should not be granted because:

1) the purported constitutional issues were not adequately raised or pressed below;

2) the Petitioner seeks to relitigate factual and evidentiary matters under the guise of a "due process" shibboleth;

3) the Petitioner sought affirmative relief based upon the very proceedings before the Referee whose appointment under a statute she now claims is unconstitutional, and is now barred from contesting the appointment;

4) the Petitioner, a lawyer, knowingly, voluntarily and fully participated in the Proceedings before the Referee, whose appointment she now claims violated due process, without taking an appeal of that appointment.

PRELIMINARY STATEMENT

The Petitioner has a documented penchant for relitigating issues. The Petitioner, a member of the bar of the State of New

York with an LLM, at every instance in this case has sought reargument, renewal and appeal and thereafter relitigated previously foreclosed matters, under the usual legal "laundry list" litany of "mistake of fact", "mistake of law", "newly discovered evidence", "fraud" and "prejudice". The Petitioner has been sanctioned and the sanction affirmed on appeal for her repetitive litigation practice. She has sought to disqualify the Respondent's attorneys on five separate occasions. She has sought the recusal of the Surrogate on at least three distinct occasions.

The Petitioner has a virtual sub-library in Lexis for the number of matters she has been involved with since 1988. A search reveals no less than 19 reported decisions. The Petitioner, in actions involving this Estate and the companion Estate of her mother, Irene B. Marsh, has been a litigant in the following Courts: Supreme Court, New York County; Supreme Court, Westchester County; Surrogate's Court, New York County; Surrogate's Court, Westchester County; Appellate Division, First Department; Appellate Division, Second Department; New York Court of Appeals; United States District Court for the Southern District of New York; United States Court of Appeals for the Second Circuit; and now the highest Court in this county.[1]

The present application for a Writ of Certiorari is illustrative of the Petitioner's litigation tactics.

COUNTER-STATEMENT OF THE FACTS

The Surrogate appointed David Rudenstine, a professor of law and assistant Dean of Cardoza Law School, pursuant to S.C.P.A. 506(1) to hear and report on this Estate Accounting Proceeding. The Petitioner never directly appealed that

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[1] This does not include ancillary litigation involving this Estate in Hong Kong.

appointment; instead she proceeded with the hearings conducted by the Referee.

The Petitioner's Estate Accounting Proceeding began with a 48-day hearing, at which 30 witnesses testified and hundreds of Exhibits, consisting of thousands of pages, were offered into evidence. The Record on Appeal ran to 7 volumes. During the course of that hearing, the Petitioner, a lawyer, had another law firm present with her to act as her "legal advisor".[2] The Petitioner did not appeal the appointment of the Referee but decided to proceed with the hearing conducted before him.

Based upon the proceedings before the very Referee she now claims was unconstitutionally appointed, the Petitioner affirmatively made a motion for a directed verdict and a distinct motion for summary judgment. The Petitioner also sought to confirm portions of the Referee's 145-page Report. After the Surrogate issued her Probate Decree modifying the Referee's Report, the Petitioner sought reargument.

The Surrogate then entered an amended Probate Decree, which confirmed some portions of the Report, rejected portions, and modified others. The Petitioner was surcharged in excess of $1,000,000, and a portion of the legal fees of the Respondents, Claudia Applebaum and Loretta Fine (the Petitioner's sisters), was directed to be paid out of the Petitioner's beneficial share of the Estate. This latter award to the Respondent's sisters was due to the harm the Petitioner had caused them as a result of the Petitioner's excessive litigation tactics.

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[2] The Petitioner's claim that she could not afford a lawyer during the proceeding (See, Petition, p. 2, footnote 2) is preposterous. Not only did she pay a lawyer to act as a legal advisor throughout the trial, she had - at last count - 17 different firms represent her in various matters, several of whom she subsequently sued for malpractice.

The Petitioner then appealed to the Appellate Division, First Department, whose panel of five Appellate Judges unanimously upheld the Surrogate's Probate Decree. In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999). Following that affirmance, the Petitioner unsuccessfully sought reargument in the Appellate Division. The Petitioner also sought leave to appeal to the Court of Appeals from the Appellate Division, which too was denied. (Appendix 6 of the Petition for a Writ). Following the denials of Petitioner's requests by the Appellate Division, the Petitioner then sought leave to appeal to the Court of Appeals from that Court. That, too, was denied. In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759 (2000). Then, having sought and been denied discretionary leave to appeal by the Court of Appeals, the Petitioner filed a Notice of Appeal as of right[3] with that Court, alleging denial of constitutional rights and the purported illegality of the Surrogate's Court Procedure Act §506. It was only then, after she appealed and lost, sought reargument and lost, sought leave to appeal on two occasions from two Courts which were denied, did the Petitioner finally give the statutorily required notice under N.Y. C.P.L.R. §1012 and N.Y. Executive Law §71, to the Attorney General of New York, that she was challenging the legality of a state statute.

Upon the filing of the Petitioner's Notice of Appeal the Court of Appeals initiated an inquiry into its jurisdiction to hear the appeal. After briefing by the parties on this issue, the Court of Appeals dismissed the appeal for "lack of a substantial

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[3] A very curious tactic since, if she believed she had a right to appeal on constitutional grounds she would have filed a Notice of Appeal as of right, rather than seeking leave to appeal on discretion. Under New York's Constitution, the Court of Appeals has jurisdiction only if there is a substantial constitutional question (with certain exceptions not relevant to this Petition.

constitutional question". In re Marsh, 2000 N.Y. Lexis 3895 (Dec. 21, 2000).

The New York Court of Appeals was correct in its determination that there was no substantial constitutional question raised and, therefore, no jurisdiction to consider the appeal. This Estate Accounting does not involve any constitutional question, much less a substantial one.

The Petitioner transmogrifies her knowing, willing participation in the proceedings before the Court-appointed Referee into a claim that she was shanghaied into participating in the proceedings against her will. This is not consistent with the facts.

Not only did the Petitioner knowingly, voluntarily participate in all proceedings before the Court-appointed Referee, more importantly the Petitioner affirmatively sought various forms of relief based upon the proceedings before the Referee she now claims was unconstitutionally appointed to hear and report. By omitting to mention these actions from her Petition, the Petitioner misrepresents her purported objections to the appointment of the Referee.

The Petitioner, a lawyer with her own knowledge of available legal remedies and as one who had a "legal advisor" with her during the trial, knew that she could have appealed the order of appointment itself, but she chose not to -- waiting instead to see if the hearing before the Referee would turn out in her favor.

I previously discussed the Petitioner's misstatement that she was financially unable to afford counsel at the hearing[4] and her misstatement concerning her voluntary participation before the Referee.

The Petitioner's statement that she raised these constitutional issues below is inaccurate except in the most superficial, vague manner. There is no reference in the Notice of Appeal regarding any constitutional challenge specifically to the N.Y. S.C.P.A. §506.[5]

Neither due process nor the equal protection arguments (which the Petitioner now mentions for the first time in the Petition for a Writ in the context of the wealthy being a protected class) appear in any meaningful way in the Petitioner's Brief to the Appellate Division. The only reference to N.Y. S.C.P.A. §506 is at two lines on page 61 of the Petitioner's Brief. The Petitioner's statement is: "If S.C.P.A. §506 permits such appointments it is constitutionally invalid." That is the totality of the statement. No constitutional analysis is offered; no

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[4] Curiously, the Petitioner claims she was too poor to retain counsel and then goes on to argue that she is a member of a protected class, i.e., the "wealthy" - to bolster her feigned "unequal protection" argument, p. 2, quote "It is a violation of due process and equal protection of the laws to subject 'the wealthy' to hearings by privately paid referees without consent and at great cost."

[5] Out of the 40 separate objections raised in her initial Notice of Appeal there is no mention of the S.C.P.A. 506 statute under which the Referee was appointed. One objection claims the award of attorneys fees violated due process "because the underlying petition and hearing sought payment from the estate." The other reference is at KK of the Notice of Appeal which reads "Violation of appellant's due process and other constitutional rights". There is no explanation or specificity as to what the complaint might be. Indeed, in her Brief to the Appellate Division, the Petitioner stated:

> "... Appellant must limit her appeal to only a few issues."

constitutional case law is cited or discussed; no notice was provided to the Attorney General as is required when a state statute is claimed to be unconstitutional. N.Y. C.P.L.R. §1012 N.Y. Executive Law §71. Such vague, general references to the constitution does not preserve a constitutional question. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed.2d 62.

The Petitioner's argument that the "wealthy" are a suspect classification for purposes of unequal protection analysis is ludicrous, misleading and wrong. N.Y. Surrogate's Court Procedure Act §506, the operative statute under which the Referee was appointed, hardly is applicable only to the wealthy. The statute provides for the discretionary appointment of a Referee by the Surrogate in any accounting where the amount involved exceeds $200.00 - hardly a marker of wealth.[6] (N.Y. S.C.P.A. §506(2)).

The New York Court of Appeals correctly rejected the Petitioner's assertions that she had raised or preserved constitutional issues and held that there was no substantial, constitutional question, and dismissed the appeal, *sua sponte*. In re Marsh, ___ N.Y.2d ___(N.Y. Dec. 21, 2000) Appendix 1A (2000 Lexis No. 3895 NY).

The Petitioner also mischaracterizes the Referee, David Rudenstine, as some political hack. David Rudenstine is a professor of law (and during the proceedings, the acting Dean of Cardoza Law School). There is not a scintilla of evidence that Mr. Rudenstine is a political crony or political hack. To color

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[6] In the particular context Estate where the Bank proved that the Petitioner had received a gift of $500,000 from the decedent in breach of the Agreement not to Change Wills, the Referee held that $500,000 was not a material breach in the context of this Estate.

this man in this manner, without any basis, is an egregious form of character assassination.

The Petitioner also mischaracterizes the legal status of the Referee appointed under S.C.P.A. §506(1). The Referee appointed in this proceeding is one to hear and **report**, not to determine. This is a critical distinction and one obliterated in the Petitioner's Brief in Support of the Writ. Where the Referee can only report, the Surrogate is the final arbiter and can accept, reject or modify the Referee's Report and even make new findings of fact. N.Y. S.C.P.A. §506(4). The Surrogate in this case exercised her judicial independence and, after reviewing the Report of the Referee, the entire record, and extensive submissions from all sides, issued her Probate Decree. The Decree accepted some portions of the Report, rejected others and modified still others. This was hardly a denial of due process or equal protection.

The Petitioner misrepresents the circumstances of the Referee's request for payment of his fees, improperly referring to it as a "clandestine" payment. The Petitioner materially fails to inform the Court that the Referee made a written application to the Court, on Notice to all parties, including the Petitioner, for his fees. The Petitioner did not file any opposition to that Application. The Surrogate, by Order served upon the Petitioner, granted the application. The Respondent Bank followed the Order of the Surrogate and made the payment. This was hardly a "clandestine" payment. Again, the Petitioner did not appeal that order.

The Petitioner also misrepresents the value of the family-owned corporations at $13 million. That appraisal was not accepted as the value of the companies. In fact the value of the companies was so minimal that it formed a basis for one of the surcharges against the Petitioner.

The appointment of a Referee to Report in a complex Estate Accounting without consent does not create any constitutional issue. Such appointments in New York have existed since before the first state Constitution in the 1700s. Cf. Steck v. Colorado Fuel & Iron Co., 142 N.Y. 236, 37 N.E. 1 (1894). It has long been the practice in Surrogate Accounting Proceedings (a successor to the Chancery Courts) to provide for appointments of Referees and Special Masters under specific circumstances. Mtr. of Luckenbach, 189 Misc. 529, 72 N.Y.S.2d 76 (Surr. Ct. Kings 1947) *aff'd* 272 App. Div. 928 (N.Y. App. Div., 2d Dep't. 1947). *See, too,* Federal Rules of Civil Procedure Rule 53(b). *See,* Ex Parte Peterson, 253 U.S. 300, 311, 40 S. Ct. 543, 547 (1920).

Ms. Lefkowitz attempts to relitigate for the fifth time the factual and evidentiary determinations made in her accounting proceeding on this Petition for a Writ of Certiorari. She has failed to demonstrate that there are any substantial constitutional questions, or that there are any compelling reasons why this Court should grant the Writ of Certiorari in this Estate Accounting.

The Petitioner is the former preliminary executor of the Estate of Nicholas V. Marsh. Her preliminary letters were suspended on March 19, 1990 pending a full hearing on her eligibility to serve as a fiduciary in this Estate. A written order confirming the suspension was signed on March 20, 1990.

After a ten–day hearing, the Surrogate issued a decision and order, dated April 19, 1990, which, *inter alia*, removed Ms. Lefkowitz as the preliminary executor and declared her ineligible to serve as the future executor and trustee of this Estate. That decision and order also appointed the Respondent, The Bank of New York (the "Bank") as the permanent executor and trustee upon its duly qualifying according to law.

On appeal, the First Department unanimously affirmed the March 20th and April 19th orders stating, *inter alia*, that the record supported a finding of improvidence justifying the Petitioner's removal. *See* Matter of Marsh, 173 A.D.2d 336, 575 N.Y.S.2d 284 (N.Y. App. Div., 1st Dep't 1991); appeal dismissed, 78 N.Y.2d 990, 580 N.E.2d 758 (1991); mot. for leave to appeal denied, 79 N.Y.2d 751, 587 N.E.2d 259. Ms. Lefkowitz filed a notice of appeal with the New York Court of Appeals, which was dismissed upon a finding that no substantial constitutional question was directly involved. In re Marsh, 78 N.Y.2d 990, 580 N.E.2d 758 (1991). Ms. Lefkowitz thereafter moved for leave to appeal to that Court, and that Court denied that motion. In re Marsh, 79 N.Y.2d 751, 587 N.E.2d 289 (1991).

Pursuant to N.Y. S.C.P.A. §506(1), Surrogate Preminger appointed Professor David Rudenstine as a Referee to Hear and Report in Ms. Lefkowitz's accounting proceeding. The Petitioner did not appeal the order appointing the referee. The Petition for a Writ of Certiorari arises from the decree entered in that Estate Accounting proceeding.

The accounting hearing began on May 11, 1994, spanned 48 days of testimony, and ended on January 3, 1995. Over thirty (30) witnesses testified at the trial. The transcript of the trial spans thousands of pages and Ms. Lefkowitz sought to admit hundreds of exhibits, many of multiple pages, into evidence. In addition, there were voluminous post–trial submissions and motions by the parties to the accounting. The Referee issued a 145 page Report, dated December 1, 1995. The Surrogate confirmed in part and modified in part the Report in an eleven page decision, dated July 29, 1997. That decision, and a subsequent decision by the Surrogate, were thereafter embodied in the Surrogate's April 23, 1998 Decree (the "Decree"). The New York Appellate Division, First Department, unanimously

affirmed the Decree. In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999).

Thereafter, the Petitioner brought on two separate motions to the Appellate Division, First Department, first to reargue that decision and second for leave to appeal to the Court of Appeals. Both motions were denied by the Appellate Division In re Marsh, ___ A.D.2d ____ (1st Dept. 2000) reported at Appendix 6A to the Petition. Thereafter, by yet another motion, the Petitioner sought discretionary leave from the New York Court of Appeals to appeal to that Court. The Court of Appeals denied that application, 95 N.Y.2d 755, 712 N.Y.S.2d 447, 734 N.E.2d 759 (2000), a copy of which is annexed to the Petitioner's Appendix at 42A. Following the denial by the Court of Appeals for permission to appeal to it, the Petitioner resorted to self help and simply filed a Notice of Appeal, as of right, with that Court.[7] The Court of Appeals dismissed the appeal finding no substantial constitutional issue directly involved. 2000 N.Y. Lexis 3895 (Dec. 21, 2000), Petitioner's Appendix 1A.

It is respectfully requested that the instant Petition should be denied in its entirety. Ms. Lefkowitz has failed to demonstrate that this appeal merits this Court's review on any grounds, including any set forth in Rule 10 to the Supreme Court Rules and 28 U.S.C. §1257.

Ms. Lefkowitz's Petition for a Writ of Certiorari should be denied for the following reasons, among others:

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[7] It is remarkable that the Petitioner believed she had to seek leave to appeal and after that application was denied, filed an Appeal as of right on the circumstances. These are precisely the litigation tactics she was sanctioned for and now she has damaged this Estate.

(a) Ms. Lefkowitz seeks a *de novo* review of the facts before the Court of Appeals, which is prohibited by 28 U.S.C. §1257 and Sup. Court Rule 10.

(b) Ms. Lefkowitz's claims of denial of "due process" are devoid of merit given her voluntary participation in the hearings, her voluminous post–trial submissions both to the Referee and to the Surrogate in connection with the hearings, her submission of opposition papers to the relief requested and her affirmative acts to confirm portions of the Referee's Report and to seek affirmative relief based on proceedings before the Referee.

(c) The Petitioner failed to directly appeal the appointment of the Referee.

(d) The purported constitutional issues were not properly raised below or pressed and are nothing more than a rehashing of her arguments concerning the factual findings and evidentiary rulings re-clothed under the cloak of "due process".

POINT I

THE PURPORTED CONSTITUTIONAL ISSUES WERE NOT ADEQUATELY RAISED OR PRESSED BELOW AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The Petitioner's initial brief to the First Department disputed the facts adduced at the accounting trial, argued about procedural defects in the appointment of and proceeding before the Referee, disputed the evidentiary rulings and quibbled with

the Surrogate's application of the law to those facts and her exercise of discretion. These same complaints are now alleged to be of a constitutional nature, warranting this Court's discretionary grant of a review. The Appellate Division, First Department concluded that the Petitioner's contentions were devoid of merit. Ms. Lefkowitz's Petition For A Writ of Certiorari mischaracterizes the evidence adduced at the accounting trial, challenges the Referee's services and quibbles with the Surrogate's findings and the reasonable exercise of her discretion, none of which provide a basis for the Court to grant the Writ of Certiorari.

A) No Constitutional or Federal Questions Were Pressed Or Preserved.

In order for the Petitioner to be considered to have been denied "due process", the Petitioner must demonstrate that she did not receive notice reasonably calculated to apprise her of the actions and relief sought and to afford her an opportunity to be heard. Booke v. Joy, 88 A.D.2d 569, 451 N.Y.S.2d 393 (N.Y. App. Div., 1st Dep't 1982) *app. denied* 57 N.Y.2d 607 (1982). The Petitioner has not, and cannot, allege such a state of facts. The Petitioner had notice of all proceedings and fully participated in them. Moreover, the Petitioner never developed any substantial constitutional arguments below but merely interjected the constitutional buzz words into her laundry list of perceived wrongs.

Petitioner states that she raised these constitutional issues at pages 61-69 of her Brief to the Appellate Division. I invite review of those pages because that review will demonstrate that no constitutional issues were raised or pressed in any meaningful, adequate way. The Petitioner provided no analysis of her

purported constitutional questions nor cited any case applying due process to the facts of her case.[8]

The discussion and argument at pages 61-69 of the Petitioner's Brief reveals not constitutional arguments but arguments about evidentiary rulings, disagreement with factual findings, alleged misrepresentations by the Referee, alleged bias and purported procedural defects - virtually everything but a constitutional argument in favor of her claim. Under this Court's interpretation of its jurisdiction under 28 U.S.C. §1257 and Rule 10 of the Court's Rules, this is insufficient to raise a constitutional issue.

Merely alleging a federal question does not give rise to jurisdiction. Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902). Certainly the issue was not pressed or preserved as required. Illinois v. Gates, 462 U.S. 213, 218-219, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983); Webb v. Webb, 451 U.S. 493, 458, 101 S. Ct. 1889, 68 L. Ed.2d 391 (1981). Casual references to a constitutional question amidst unrelated arguments is insufficient. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed.2d 366 (1993).

The Court should defer in the absence of exceptional circumstances to the State Court's findings of fact. No exceptional circumstances are shown to deport from this principle. Hernandez v. New York, 500 U.S. 352, 366, 111 (S. Ct. 1859), 114 L Ed.2d 395 (1991).

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[8] The only citation to any federal case in the Petitioner's Brief is at p. 69 where two cases are cited for the proposition that due process applies to state laws.

The apparent attempt by the Petitioner to allege an unequal protection argument based upon a classification of the "wealthy" is not only frivolous and wanting in substance but also was never raised before. This provides no basis for review. Hodges v. Snyder, 261 U.S. 600, 601, 43 S. Ct. 435, 67 L. Ed.2d 819 (1923). Frivolous claims are not entitled to review. Crumpacker v. Indiana Supreme Court Disciplinary Comm'n., 470 U.S. 1074, 1074-1075, 105 S. Ct. 1829, 85 L. Ed.2d 130 (1985). Even more ludicrous are the purported public policy issues asserted at page 2 of the Petition that the Internal Revenue Service will be deprived of substantial revenue because the fees paid to a Referee will be deducted from Estate Tax Returns.

Further, under N.Y. C.P.L.R. §1012 and N.Y. Executive Law §71, whenever a challenge is made to the constitutionality of a state statute, notice must be given to the Attorney General. Cleary v. Board of Education, 243 A.D.2d 949, 953, 663 N.Y.S.2d 374 (N.Y. App. Div., 3d Dep't. 1997). The Petitioner did not provide that notice at the Surrogate's stage of the proceedings nor at the Appellate Division stage. It was not until she lost her two applications for leave to appeal and then filed a Notice to Appeal with the Court of Appeals did she provide such notice. This is important because if she had in fact raised a constitutional question, why did she not provide the notice required when a state statute is challenged? The answer to that rhetorical question is obvious.

POINT II

THE PETITIONER'S ACQUIESCENCE IN THE PROCEEDINGS BEFORE THE REFEREE BARS ANY COMPLAINT ABOUT HIS APPOINTMENT

The Petitioner, an attorney admitted to practice in New York, fully participated in all proceedings before the Referee. These proceedings included pre-trial conferences, the attorney fee applications and the 48-day Accounting and surcharge proceeding. The Petitioner never sought to stay or enjoin these proceedings. More importantly, she never took an appeal of the Order of Appointment, nor does she even include a copy of the Order in her Appendix to the Petition. Instead, she voluntarily participated before the Referee waiting to see how they would turn out.

Even more critical is the fact that the Petitioner sought affirmative relief based upon the proceedings before the Referee she now complains was unconstitutionally appointed. The Petitioner sought a directed verdict and, by a separate motion, summary judgment based upon the proceedings before the Referee. The Petitioner also sought to have the Surrogate confirm portions of the Referee's Report. Nor did the Petitioner appeal all portions of the Surrogate's Probate Decree entered after the Referee's Report. The Petitioner's voluntary acquiescence and applications for affirmative relief bars her from now complaining about his appointment or procedure. Chalu v. Tov-Le Realty Corp., 220 A.D.2d 552, 632 N.Y.S.2d 806 (N.Y. App. Div., 2d Dep't. 1995).

The Petitioner is barred from attacking the Appointment of the Referee or the proceedings thereunder.

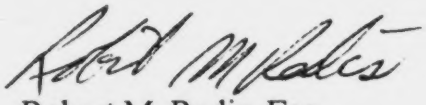
CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Dated: April 18, 2001
White Plains, New York

Respectfully submitted,

McCARTHY, FINGAR, DONOVAN,
DRAZEN & SMITH, L.L.P.

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No. 00-1462

In the
Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, et al.,

Respondents,

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New York

REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

ARGUMENT 1

I. THE ISSUE OF THE CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE HEARING 1

A. The Arguments Were Adequately Preserved 1

B. There Was Objection And No Acquiescence 3

C. This Hearing Was Constitutionally Defective 5

D. The Issues Raised Are Compelling 8

II. THE AWARD OF $250,000 IN ATTORNEY FEES WITHOUT NOTICE OR A HEARING 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Estate of Burns, 130 Misc.2d 317 (Surr. Broome, 1985) affirmed,126 A.D.2d 809 (3d Dept. 1987) 10

Estate of Marsh, N.Y.L.J. 10/12/95, p. 29 4

Estate of Marsh, N.Y.L.J., 3/16/98, p. 27 4

In re Luckenbach's Estate, 189 Misc. 529 (N.Y.Sur. 1947) 7

Logan v. Zimmerman Brush Co., 455 U.S.422, 102 S.Ct. 1148 (1982) 3

Matter of Dillon, 28 N.Y.2d 57 (1971) 9

Matter of Estate of Campbell, 138 A.D.2d 827 (3d Dept. 1988) 9

Matter of Urbach, 252 A.D.2d 318 (3d Dept. 1999) 9

Matthews v. Eldridge, 424 U.S. 319 (1976) 7

Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971) 6

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) 3

Steck v. Colorado Fuel and Iron Co., 142 N.Y.236 (1894) 7

United States v. Deglomini et al., 111 F.Supp.2d 198 (E.D.N.Y. 2000) 10

United States v. Raddatz, 447 U.S. 667 (1980) 8

Will of Marsh, 179 A.D.2d 581 (1st Dept. 1992) 4

STATUTES:

CPLR §4212 7

CPLR §4317(b) 7

CPLR §4321(1) 4

Jud. Law §290 5

SCPA §506 ..... 1, 2, 3, 7

SCPA §506(i) 3

SCPA §506(3) 4

SCPA §506(4) 5, 6

ARGUMENT

Only BNY[1] filed objections to petitioner's accounting although the Fines and Mrs. Appelbaum received citations. The Fine and Appelbaum submissions to the trial court and the Appellate Division were addressed only to the fee petitions of Shea & Gould and Greene & Zinner. Thus all respondents except BNY have waived their rights to argue on any issue except that regarding the $250,000 in fees. Lest the Court consider all the briefs on all issues, they will be addressed as space allows.

I. THE ISSUE OF THE CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE HEARING

A. The Arguments Were Adequately Preserved

The issue of the adequacy of the argument below is distinct from the issue of preserving the argument. An argument may seem unconvincing but nevertheless may preserve the issue. It is for this Court and not respondents to determine whether a federal question was preserved and then whether it is adequately argued. (See Pet. p. 3)

Significantly neither the New York Court of Appeals nor Appellate Division ruled that the issues were not preserved. (Nor did respondents cross-appeal that or any issue.) "No substantial constitutional question" is not synonymous with dismissal on the grounds that the issue was not preserved.

The Respondents' arguments about notice to the New York State Attorney General are also without merit. Petitioner first

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[1] "BNY" refers to The Bank of New York. "JMI" refers to Joseph Markovits, Inc. "MFDDS" refers to estate counsel McCarthy, Fingar, Donovan, Drazen & Smith. References to Petitioner's March 19, 2001 Petition to this Court will be denoted as "Pet. p. ___." References to BNY's brief in opposition will be denoted hereafter as "Redis p. ___." References to the brief in opposition for the Fines will be denoted hereafter as "Fine p. ___." References to the brief in opposition by Greene & Zinner will be denoted hereafter as "G & Z p. ___." See also footnote 5 on Pet. p.5. The BNY corporate disclosure statement is at Pet. p. vi.

gave notice when required to do so by the Rules of the Court of Appeals. (Mr. Redis' speculation on the course chosen by petitioner is wrong. She preferred leave to appeal on all issues, not just the constitutional ones.) The statutes BNY and Fine rely on refer to notice to be given by the courts or actions to be taken on their initiative. Even when the New York State Attorney General *was* notified he did not appear nor did he object to lack of earlier notification. Nor is this issue relevant to constitutional infirmities in the hearing or the application of SCPA §506.

Even BNY cannot refute that petitioner cited cases on due process law. The Siegel quote on Pet. p. 17 was used in petitioner's argument *to the trial court*. Mr. Redis quoted only one *part* of the argument to the Appellate Division. Indeed on p. 61 alone petitioner had argued to the Appellate Division:

> "This appeal raises the issue of the legality, indeed the constitutionality, of the appointment of a Referee to Hear and Report, *sua sponte* by the Surrogate, generating large expenses to the parties and estate and denying access to a duly constituted judge of the court, without consent of appellant, in a substantial matter involving millions of dollars. If SCPA §506 permits such appointments it is constitutionally invalid.

Petitioner then quoted Prof. Siegel on the constitutional issue. This was followed by extensive examples of the defects to the hearing such as the payment before filing the Report and *ex parte* conferences. On p. 64 petitioner began an exposition on other aspects of the hearing which "also denied appellant her constitutional rights to due process and a fair hearing," one key aspect of which was precluding a live court report (p. 65). Other examples were allowing a partner of Mr. Redis to sit at the counsel table even though he was a key witness, the

Referee's various misrepresentations to petitioner (p. 68), and failure to allow any hearing at all on several issues (p. 69).[2] In fact the recitation at Fine pp. 9-11 lists additional examples of petitioner's preservation of constitutional issues.[3]

As noted on Pet. p. 17 the constitutional challenges were first raised to the trial court (Cf. Fine p. 7). That the Appellate Division did not use precise constitutional language is not dispositive. (See quotation on Pet. p. 4.)

B. There Was Objection and No Acquiescence

BNY must be conceding that consent was necessary when it erroneously argues petitioner "consented" by participation. The case cited by BNY is inapposite because it is unrefuted that petitioner timely objected to the reference. The order appointing the Referee (39a)[4] was an interim order and not a

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[2] On p. 69 of the brief petitioner also argued to the Appellate Division: "Under all these circumstances it is clear the appellant was denied her constitutional right to a fair hearing and her property was taken from her without due process of law. The due process requirements of the Fifth and Fourteenth Amendments apply to state laws. Where state law is inconsistent with federally guaranteed rights the federal rights are controlling. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S.422, 432, 102 S.Ct. 1148 (1982); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Accordingly the decree should be vacated."

[3] Mr. Redis conspicuously omitted the heading of the section of the brief that includes pp. 61 to 69: "Appellant Was Denied Her Constitutional Right to a Fair Hearing Before an Appropriate Tribunal" (p. 57)

[4] Redis p. 16 claims petitioner did not "even include a copy of the Order in her Appendix to the Petition." This is but one of many misstatements made in BNY's submission. In a 10-page reply to multiple answers there is not sufficient space to address all the errors. However, a few more egregious examples will be addressed. On Redis p. 8 he stated: "The Petitioner also mischaracterizes the legal status of the Referee appointed under SCPA §506(i)." This is ludicrous. Not only is SCPA §506 titled "Reference to hear and report" and printed at 46a, but on Pet. p. 14 petitioner argued that it is the Surrogate that is the decision maker but was "unfamiliar with the facts and ignored key stipulations". On Pet. p. 16 petitioner specifically described the Referee as one to hear and report. Finally, the Siegel quote on Pet. p. 17 specifically discusses references "to report".

final order. Thus the appropriate time to appeal it was in the

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BNY also takes issue with petitioner's assertion that the referee was paid $108,358.50 before he issued his report. (Cf. Pet. pp. 10 & 17.) The Petition is not misleading. The Referee sought payment by motion (without citations or order to show cause). While the Surrogate determined his hourly rate (and first portion of his fees), she did not order the payment be made *before* the Report was submitted. Respondent Appelbaum's argument on G & Z p. 7 is illogical. The prior order appointing the Referee (Pet. p. 39a) failed to set forth his hourly rate or who would pay it, contrary to CPLR §4321(1). Moreover, the Surrogate would not have known the Referee would delay his Report until December 1995 in violation of SCPA 506(3). Thus the Court order corrected the omissions from the order appointing the Referee. It was not a license to violate longstanding New York law. Nor does length of the proceeding provide grounds to violate the law. The integrity of the hearing is violated by prepayment irrespective of the length of the hearing. The Referee sought the payment from BNY by letter and received a check by return letter. Petitioner was never copied on either letter. She later learned of the clandestine payment during discovery for another proceeding. After petitioner objected to the clandestine payment, a subsequent order (*Estate of Marsh*, NYLJ, 3/16/98 p. 27, see also NYLJ, 5/21/97 p. 28) instructed that the later fee be paid *after* the Referee concluded his duties.

BNY repeatedly (at Redis pp.3, 5, 6 and 16) refers to petitioner as an attorney but omits the fact that petitioner has never practiced law. BNY also states on p. 6: "I [sic] previously discussed the Petitioner's misstatement that she was financially unable to afford counsel at the hearing ..." Yet BNY withheld petitioner's share of the first substantial estate distribution and paid it only under court order *(Estate of Marsh*, NYLJ 10/12/95, p. 29) in October 1995. This was after the 1994 hearing and 1995 post-trial submissions to the Referee. (*BNY continues to seize petitioner's distributions from both her parents' estates despite payment of the 1998 and later assessments.*)

Finally, it is necessary to briefly respond to BNY's extensive digression to the litigation related to the Marsh estate. Petitioner was indeed sanctioned by Surrogate Preminger in 1993 for an order to show cause for disqualification of MFDDS and/or its attorney Streng from *this* accounting proceeding. An earlier disqualification motion in 1990 in the course of the probate proceeding had been denied during a hasty and incomplete hearing. See *Will of Marsh*, 179 A.D.2d 581 (1st Dept. 1992) describing the strewing of petitioner's files by attorney Streng as he searched her office. The 1993 effort to disqualify MFDDS related to the fact that Mr. Streng was to be (and was) a key witness at the 1994 accounting hearing.

As to motions to recuse Surrogate Preminger (Redis p. 2), petitioner learned inadvertently that the Surrogate was co-authoring a book with one of petitioner's adversaries during the accounting proceeding. (A-4940)

Finally, the 1998 decree at issue is an accounting decree, not a probate decree. The probate decree was issued in 1992. (Cf. Redis pp. 3, 4 and 8.)

context of the final order, as occurred in the case at bar. Nor was a stay a viable alternative. Indeed petitioner had no choice but to participate in the hearing lest she lose all her rights. BNY's argument is without merit as is its argument that petitioner sought "affirmative relief." It is preposterous to think that petitioner would not submit motions and applications during the accounting proceeding. To do otherwise might risk a default. Indeed, unless a motion is timely made to the Surrogate, the Referee's Report would be deemed confirmed. SCPA §506(4). (See 47a)

C. This Hearing Was Constitutionally Defective

On Redis p. 13 BNY argues that: "Petitioner must demonstrate that she did not receive notice reasonably calculated to apprise her of the actions and relief sought and to afford her an opportunity to be heard" to be deemed to have been denied "due process". It is true that without proper notice and an opportunity to be heard there is no due process. However, it is not true that reasonable notice and opportunity to be heard are the only requirements of due process.

It cannot be refuted that the hearing transcripts were defective to the point of misidentifying the speaker (See Pet. p. 19 and A-2569-2631). Because the Surrogate did not conduct the hearing herself the transcripts and documentary evidence were her only direct links to the hearing. In fact, insofar as petitioner's accounting, the Surrogate only deviated from the Referee's Report by modifying the objection regarding the Hong Kong estate duty penalty. (A difference of about $13,000.) In this *one and only deviation* from the Referee's Report the Surrogate had documentary proof of communications to and from the Hong Kong Inland Revenue Department on which to rely. (See last 10 lines of long paragraph of Pet. 35a.) (While G&Z p. 9 takes issue with reliance on Jud. Law §290 as not in effect in 1994, under that

argument there was *no* authority for using mechanical transcription.)

There were no reliable transcripts on which petitioner or the Surrogate or appellate courts could rely. Thus there could be no effective independent determination by the Surrogate except where the documentary evidence was clear cut. Cases are legion that transcripts are crucial to effective appeals. So too were they critical for the Surrogate to make an independent determination. Thus the absence of reliable transcripts denied petitioner a fair hearing or effective review by the Surrogate or appellate courts.

The Fine arguments on Fine pp. 14 and 16 lack merit. The Report is automatically deemed confirmed in the absence of motions. SCPA 506(4). Moreover, appellate review is not a substitute for a fair trial. If it were, no case would ever have to go beyond the first level of appellate review. Nor is a lengthy hearing necessarily a fair one, particularly where the referee was paid by the hour.

A proceeding in which the decider of fact did not conduct the hearing and does not even have reliable transcripts to reflect the testimony accurately does not pass constitutional muster. See also Pet. pp. 13-15, 17-20. petitioner had repeatedly argued that the inadequate transcripts and refusal to permit her transcriber to make an unofficial transcript denied petitioner due process. This Court has itself emphasized the importance of adequate transcripts to due process. See, e.g., *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971).

The issues in the accounting did not call for a lawyer with expertise in labor law. The key issues required expertise in trusts and estates law, which the referee lacked. Clearly the appointment of a labor lawyer contradicts BNY's "complexity" argument. *Nor was this a long account.* In fact the account covered a mere 21 months. The fact remains that the Referee

was not a special master. Nor was this an advisory jury.[5] The cases dealing with appointments made in years prior to the enactment of SCPA 506 are irrelevant. The appointment was made on the basis of the wealth of the estate and was a patronage appointment.[6] In fact *Steck v. Colorado Fuel and Iron Co.*, 142 N.Y.236 (1894), cited by BNY, indicates references without consent are disfavored in New York. *(In re Luckenbach's Estate*, 189 Misc. 529 (N.Y.Sur. 1947) is inapposite. Not only does it predate the enactment of SCPA 506, but it involves the examination of the accounting party, not the post-objection hearing phase of an accounting.)

Matthews v. Eldridge, 424 U.S. 319 (1976) relied on at Fine p. 13[7] is inapposite since it dealt with adequate administrative proceedings within the Social Securities Administration. However, even under the *Matthews v. Eldridge* standard the hearing was constitutionally defective. At least $2,000,000 and petitioner's reputation were the implicated interests. There was a huge risk of an erroneous determination because of the process used (particularly with defective transcripts). Indeed petitioner recited some of the errors at Pet. p.14-15. Had the court followed the usual procedure the errors would have been avoided as would the issue of prepayment of a referee. The public (and IRS) interest in avoiding prolonged

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[5] CPLR 4212 cited at G&Z p. 4 is for advisory juries and exceptional circumstances. An order under this rule must specify the issues to be submitted. CPLR 4317(b) is only for long accounts. Moreover it is superceded by SCPA 506. There no longer are references to determine in Surrogates Court.

[6] There has been extensive commentary about patronage in the New York Surrogates Courts. See, e.g., *N.Y. Times* editorials 5/26/00 and 6/13/00.

[7] The Fines err on Fine p. 15. petitioner was ordered to undergo an accounting proceeding at the Surrogate's Court. She had to submit to the adjudication. Thus the state did exclusively control the legal relationship.

defective hearings that trigger delay and further litigation had been cited by the Surrogate herself (Pet. p. 16). *United States v. Raddatz*, 447 U.S. 667 (1980) is also inapposite. It involved a magistrate who decided *a motion*, not the ultimate trial. Moreover, in *Raddatz*, there were reliable transcripts and no equal protection issues. Nor was the magistrate's objectivity clouded by a prepayment.

D. The Issues Raised Are Compelling

Respondents' briefs are dismissive of the significance of the issues presented by this petition. However, at $300,000 and up per estate, the amounts lost by the IRS as well as estates are enormous. Moreover, *if this petition is not granted*, the decisions below will stand and be the law that unsworn referees may be imposed over opposition, be paid by one party before submission of the report, deny a litigant a reliable transcript, and flagrantly violate numerous New York statutes. Moreover, where "wealthy" estates are subjected to lengthier, extraordinarily expensive, more burdensome yet less effective procedures, there is a serious constitutional violation. This indeed may be a case of first impression invoking the classification of "the wealthy" as opposed to the impoverished, yet both are categories of classification according to economic means. Finally, since the $250,000 for attorney fees were awarded on motion without notice or a hearing, if this petition is not granted a license will be created to dispense with notice and hearings in reallocating estate interests.

II. THE AWARD OF $250,000 IN ATTORNEY FEES WITHOUT NOTICE OR A HEARING

Only respondent Appelbaum opposed this portion of the Petition. There is no doubt that this due process issue was properly preserved and pressed at the first opportunity. The argument on G&Z p. 2 ignores Pet. p. 17 and all the references to the appellate appendix, which indicate issues were preserved

at the trial court level, at Pet. p. 52a *et seq*.

The decree incorporates this fee issue. Since it is indisputable that petitioner was denied due process on the fee issue, the entire decree is invalid.

The cases on G&Z p. 12 are of no assistance to respondent. In the disciplinary case(s), valid transcripts were available and the use of special referees was routine. (The Appellate Courts are not trial courts.) Here the Surrogate has violated principles of equal protection by imposing the referee on the basis of wealth of the estate.

The argument on G&Z p. 17 is of no avail to respondent. Here the fee petitions were the pleadings, and functioned as the stipulations did in *Matter of Estate of Campbell*, 138 A.D.2d 827 (3d Dept. 1988) to limit the relief available - recovery from the general assets of the estate.

The fees sought were related to the 1990 removal, which is not considered an enlargement of an estate. Moreover, Mr. Ball conceded in 1994 that his firm had not increased the estate. (A-408). Greene & Zinner's assertion that it identified additional estate assets should have been subject to a formal hearing to dispute its self-serving claim.[8] More important are the $4,000,000 loss at JMI in 1990 following the takeover and

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[8] The Greene & Zinner Brief contains too many errors to address in limited space. *Inter alia*: The loan sought in 1990 was not from outside investors but from a Hong Kong company owned 50% by the estate (Cf. G&Z p. 15). The fee petitioners did *not* participate in the 1994 accounting hearing (Cf. G&Z p. 18). Footnote 11 is incorrect. This was the first time petitioner's estate interest was charged. However, *BNY is currently seeking an additional $1 million from petitioner's estate interest despite the release in the decree. (Pet. p. 25a). Matter of Dillon*, 28 N.Y.2d 597 (1971) and *Matter of Urbach*, 252 A.D.2d 318 (3d Dept. 1999) make clear that an SCPA §2010 fee proceeding (as these were) may not be used to award payment from a beneficiary's interest in the estate to an opponent. There were less than 3 days spent on the 3 fee hearings (Cf. G&Z p. 21). They were defended by MFDDS since the fees were sought from the general assets of the estate.

later retainer of an accountant, Thomas Borek, for JMI with ties to organized crime. *Cf. United States v. Deglomini et al.*, 111 F.Supp.2d 198, 199 (E.D.N.Y. 2000). Because the net effect of the firms' work diminished the estate, and because there was no notice or hearing in the case at bar *Estate of Burns*, 130 Misc.2d 317 (Surr. Broome, 1985) is inapposite.

In G&Z footnote 2 p. 5, respondent argued that "an appraisal of the totality of facts in a given case is the appropriate test of whether due process has been denied." No respondent disputed that the stipulations were ignored or that the Surrogate made serious errors, or that the transcripts were so bad that they even misidentified the speakers. No respondent took issue with the recitation on Pet. p. 9 (other than BNY's claim that the $13 million appraisal was too high). The totality of the circumstances in the case at bar makes clear that due process was denied and petitioner did not receive a fair hearing. And in the matter of the $250,000 for attorney fees, there was no notice or hearing at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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